The Official Information Act: A Beginning

Edited by
R.J. Gregory

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Introduction

In recent years calls for much greater public access to official information have been heard in a number of western democracies, and legislative changes have often resulted. Within the past year or so Australia's federal Parliament, and the Victorian state legislature have enacted laws providing for more open access, and similar statutes have been passed in Canada, at the federal level, and also in Newfoundland, New Brunswick, Nova Scotia, and Quebec. Some years earlier, in 1966, the United States' Freedom of Information Act was passed (and amended in 1974); while in 1970 major legislative moves in this direction were made in Denmark and Norway.

New Zealand has shared in this experience. In May 1978 the government established a committee on official information to "contribute to the larger aim of freedom of information by considering the extent to which official information (could) be made readily available to the public", and in particular "to examine the purpose and application of the *Official Secrets Act 1951*". This became known as the Danks committee, after its chairman, Sir Alan Danks (then chairman of the University Grants Committee).[1] It reported to government three years later.[2] Then followed the passage through Parliament of the *Official Information Act 1982*, which came into force on 1 July 1983.

The Danks reports articulated, among other things, the principal arguments on the need for such legislation to replace the highly contentious Official Secrets Act, and these propositions were well rehearsed during subsequent public and Parliamentary debate. However, passage of the Official Information Act did not and could not resolve a range of differing, sometimes conflicting, expectations about how the new legislation would work in practice. So in order to provide a forum for persons closely involved with or deeply interested in the administration of the Act the New Zealand Institute of Public Administration decided to make it the focus of attention of its 1983 annual convention, held at the James Cook Hotel in Wellington, from 24 - 26 August.

Those who presented papers could not, of course, deal with all the ramifications of the Act: they were invited so that a representative rather than an exhaustive range of perspectives could be discussed at the convention. This book constitutes a record of those presentations and of the subsequent discussions.

The convention itself was a further reflection both of the processes of change which are overtaking governmental administration in New Zea-

land, and the Institute's preparedness to play a role in informing and recording those impulses.

Those attending were in no doubt that the advent of the Official Information Act represented a most significant event in the history of New Zealand public administration. But it was also recognised that the Act itself — because it necessarily promotes access to information while at the same time protecting the confidentiality of certain material — is a highly complex piece of legislation, the impact of which will become fully apparent only as its provisions are tested by the realities of practical interpretation and application. These in turn will be mediated by procedural prescriptions authored by such bodies as cabinet and the State Services Commission, and by reviews carried out by the Information Authority. (At the time of writing the Authority is examining protection accorded information by other pieces of legislation, and the powers and practices of departments and organisations in requesting personal information.)

In short, it was acknowledged that a considerable amount of time will be needed — probably a few years — before the full effects of the new legislation are manifest. This is particularly so because much will depend in the first instance on the attitudes that are brought to bear on the operation of the Act. If any single theme was emphasised by the convention then this was it. It was observed that public servants have increasingly come to see themselves as mediators between the political executive and the public at large. The Official Information Act, it may be argued, both reflects the emergence of that role and reinforces it. New Zealand public servants now work in an environment that is far less inclined to accept the tradition of official secrecy, or be satisfied with information — no matter how much of it (and the convention acknowledged that in New Zealand there has always been plenty) — the release of which has been almost entirely at the discretion of officialdom.

Nevertheless, the convention also acknowledged that the Act could conceivably hinder the natural development of more open processes of information exchange, that it could amount to little more than a new set of rules for an old adversarial political game, if its application were not guided by positive and cooperative attitudes towards it. Such attitudes would be required not just of public servants and others called upon to administer the Act, but also of those seeking information. In particular, it was several times remarked that the opportunity now existed to diminish the mutual suspicion that has often tended to mar relationships between the news media and officers of governmental agencies.

The alliteratively alluring question posed in the convention's original title was, *Official Information Act: Panacea or Placebo?* That inquiry, however, was largely eschewed. Instead, the Act was seen as a beginning.

As the following pages show, the convention raised and discussed not only these broader, more generalised issues relating to the implementation of the Act, but also a range of more specific questions about the legislation and its application. Because the Act had been in force for only seven weeks at the time of the convention the discussion was inevitably based more on expectation than experience. (Since then the Act has seldom

been out of the news for long. Notably, two decisions, one by the acting Minister of Labour, and the other by the Minister of Education, both overruling the Chief Ombudsman's recommendations for release of information — on unemployment statistics and on school computers, respectively — have highlighted the issue of ministerial veto.) Yet the convention did not attempt to predict the impact of the Official Information Act. Accordingly, rather than offering definitive answers to all manner of questions this book is intended to provide more of a benchmark account of some issues and views considered pertinent at a very early stage of the Act's implementation.

Editor.

References

1. Other members were K. J. Keith (a Professor of Law at Victoria University of Wellington); B. J. Cameron (Deputy Secretary for Justice); W. B. Harland (Assistant Secretary of Foreign Affairs); W. Iles (Chief Parliamentary Counsel); D. B. G. McLean (Secretary of Defence); P. G. Millen (Secretary of the Cabinet); and R. M. Williams (Chairman, State Services Commission).
2. See, Committee on Official Information, **Towards Open Government, General Report,** Wellington, Government Printer, 1981; and **Towards Open Government, Supplementary Report,** Wellington, Government Printer, July, 1981.

Knowledge as Power? An Overview by the Convention Chairman

Robert Gregory

The shape and detail of the Official Information Act have now been determined, at least in the meantime, and there is no doubt that considerably more time will have to pass before it becomes clear as to how it will work in practice. The only thing that is perfectly clear at the moment is that the legislation is very complex, and that attitudes and expectations held towards it are diverse and often conflicting. It is noteworthy, for example, that during the first month of the Act's operation the ombudsmen received 17 requests to review decisions denying access to information. Also, consider the following two views. On the one hand that of the Attorney-General, who considers the Act to be the "most important constitutional innovation since the Ombudsman was established in the early 1960s"; and on the other hand the opinion of a *National Business Review* journalist (Warren Berryman) who recently described it as "a political huckster's trick — the same rotten deal (as the Official Secrets Act) in a bigger, brighter, more publicly acceptable package". Nor must we forget the Prime Minister, who expects it to be "a nine-day wonder".

It is precisely this diversity of opinion, and these differing expectations, that make this convention timely. Apart from providing a forum for conflicting opinion, by bringing together in the one place at the one time many people with a direct interest in its operation, this convention can be influential in shaping the working of the Act. In this regard we have a wide range of options open to us. We might articulate a desire for disclosure that transcends the reticence built into the Act as it stands. Or we might simply provide a catharsis for the anxieties of those who believe in the three articles of public service faith expounded in the television programme, *Yes Minister* — namely, that it costs more to do things cheaply, it takes longer to do things quickly, and it is more democratic to do things secretly. Those people may fear that greater disclosure heralds the imminent collapse of the New Zealand governmental system as they know it — and prefer it. I doubt, however, if there are many of them among us here.

Robert Gregory is a Senior Lecturer in the School of Political Science and Public Administration, Victoria University of Wellington.

There are probably some who will argue that having the Act drafted by a committee composed mainly of top public servants was akin to the idea that the Society for the Promotion of Community Standards should draft indecency laws. They would see the Act as being at worst hopelessly over-protective of executive interests, and at best a cautious shift away from the reprehensible Official Secrets Act towards a more widely embracing and more democratically-fulfilling freedom of information act. In other words, they would argue that while the principle that information should be kept secret unless there is good reason for its disclosure, has been turned on its head, nevertheless the very complexity of the Act reflects an extremely cautious reconciliation between people's right to know and governments' desire to conceal.

Most of the questions surrounding this legislation turn on this central argument. There are, of course, many such questions. Are ministers and officials given too many loopholes through which they can avoid disclosure? Should the minister have the final say in deciding whether information should be released? Should the courts have more say in the appeal process? Will the Act inhibit the free and frank advice upon which effective government depends? Will it create dual information systems — one for public and one for private consumption? Should it apply to a wider range of publicly accountable bodies, and if so which ones? Will the news media, as suggested by Sir Alan Danks, tend to harden into issues of black and white the necessarily conjectural thinking that provides the basis of much governmental decision-making? And as argued by the Public Service Association, ought not provisions for disclosure of information be extended to cover the so-called private sector as well? Some of these questions along with others focusing on the daily operation of the Act will be raised during this convention.

By way of introduction, however, I may enjoy the luxury of a broader view of the Act, which is the New Zealand result of a movement among western nations generally for greater popular access to official information. This drive can certainly be justified in terms of an impeccable democratic logic. Calls for wider participation in the decision-making process and for greater accountability in the exercise of expanding executive power are appeals which can be denied only by those who lack any hint of democratic sensibility. Yet the decisive element has not been the force of the idea itself but the fact that it is an idea whose time has come. This quest for more liberal disclosure of information is really only the latest manifestation of the historical process of rationalisation, which has underpinned the development of modern industrial societies. This drive to organise human affairs on the basis of objective, technical, knowledge has been at the heart of many governmental reforms during the past century or so. For example, it was apparent in the transfer of executive power from the British aristocracy to the upper middle classes through the Northcote-Trevalyan reforms of the civil service during the 1850s and 1860s. It was the essence of the American drive for so-called "good government", which sought to separate politics from administration in the search, however futile, for technically correct rather than politically acceptable answers to society's problems. More generally speaking, this process of

rationalisation has brought with it the age of the expert; and because experts are those who know a great deal about very little, their numbers grow as knowledge becomes increasingly theoretical, technical, and specialised.

The knowledge explosion of recent decades has therefore brought with it the rise of the professions. These are occupational groups whose power and prestige is based on their members' education and training, and their problem-solving skills, not to mention their ability to instil in the mind of the lay-person a usually secure belief in his or her own ignorance. So where power and position have become functions of knowledge and education rather than wealth and inheritance, governments have had new problems in legitimising their actions. While they still find it necessary to behave as if they have a monopoly on wisdom, they quite obviously no longer have anything approaching a monopoly on the means of calculating and assessing the desirability and feasibility of policy decisions. Today there are many people out there whose education and training, and whose employment in the service of a multitude of partisan interests impel them to seek a piece of the policy-making action. The notable American sociologist, Alvin Gouldner, calls them the "new class".[1] They are often particularly frustrated with politicians who, as one observer notes, they perceive as being "corrupt, uncultivated and incompetent all at once". Above all, they tend to share a generalised commitment to the open exchange of critical opinion and analysis: to the need for authority to justify its decisions on grounds that will stand up to the closest, the most informed, and the most rational scrutiny. It is no longer enough just to be wise or powerful, now one has to give reasons. Accordingly anything that smacks of secrecy and censorship is anathema. That is one general reason why there has been a tendency in recent years for official information to fall mysteriously off the back of trucks; why there has apparently been — dare I say it? — rather less inclination to accept the view that "in all circumstances the public servant's first and paramount loyalty is to the law",[2] or that his or her principal duty is to the minister.

Professionals often feel frustrated by the bureaucratic context within which they work. They have come to learn through experience what Max Weber many years ago deduced from observation: that "the concept of the official secret is the specific invention of bureaucracy". But this frustration is a good thing. It means that despite popular opinion to the contrary there is a considerable well-spring within government agencies of positive attitudes towards the idea of greater openness in government.

But that is not the full story. For whether or not public bureaucracies are as naturally secretive as they once were, many people still see them as being wasteful, perverse, cumbersome, insular, inflexible, obdurate, self-protective and not very good at doing the things that over the years our politicians have asked of them. It is ironical that while the so-called knowledge explosion has improved government's technical capacity to carry out its tasks it has also tended to exacerbate the problems of government. Because there is now far more expertise around, both within official corridors and beyond, there is also much less certainty, not more; far greater scope for dissent and disputation. This is why there is some truth

in the argument that the last thing any government wants is to be well informed. Governments prefer to act rather than to analyse, but now they are increasingly required to do both. All this demonstrates once again the truth of the old political adage that power must be shared if it is to be retained. New Zealand's Official Information Act makes a virtue of this necessity, as does similar legislation in other countries. These developments parallel the introduction of universal suffrage in an earlier era. Just as the middle and working classes sought power and were given the vote, so today's professional classes seek power and are given information. The process is called participation, and the result is called accountability. Together those two ideas constitute the two primary purposes of the new Act.

It is not all political sweetness and democratic light, however. There is another dimension to this whole question of official information; and it is simply this. We are often told that knowledge is power. But I think that is a metaphorical cliche. Like any cliche it saves people the trouble of having to think for themselves, and like many metaphors it has become transformed into a myth. It seems to me that if knowledge is power, then knowledge is also lack of power. We know that relationships between research and analysis on the one hand and politics and power on the other are usually very uncertain — ask any economist. But more important for our purposes is the recognition that in policy-making terms, data, information and knowledge are separate and distinct concepts. Putting it briefly, raw data if you like is simply some aggregate of facts and figures, while information is data interpreted for the purposes of decision-making and policy choice. The facts, in other words, never speak for themselves.

Furthermore, the process of interpreting them is the process of knowing them, of transforming data into information by filtering it through the perceptual screens — the beliefs and attitudes — that policy-makers bring to their tasks. These screens form what we might call interpretive knowledge, or common knowledge, which can be distinguished from causal knowledge or the ability to produce intended effects.

The point is that particularly in the broad area of government social policy both types of knowledge are inevitably highly precarious. The problem, however, is that bureaucracies are very adept at transforming doubt into dogma. Bureaucracy is instrumental in defining the world around it, and it is especially receptive to data that tends to confirm those definitions, thereby entrenching them in the organisational consciousness. (This, incidentally, is why the provision in the Act enabling a request for information to be refused because it is considered frivolous, vexatious or trivial is by no means as reasonable as it sounds.) It is also true that the data upon which bureaucracies feed most voraciously is statistical, quantitative data. So computers, rather than replacing bureaucracy, are really reproducing it in its quintessential form.

Now it is undeniable that democratic aspirations make it imperative that these data bases, and the interpretive frameworks applied to them by executive agencies, be open to public scrutiny, to challenge, and to open-ended revision. Demonstrating the necessarily incomplete and con-

tentious knowledge and information upon which policies are based — in other words, exposing the naked civil servant — may certainly embarrass decision-makers. But this discomfort is simply the price they pay for the power they wield. Nevertheless, it seems to me that it will be democratically counter-productive if such exposure simply induces the executive to protect itself by generating more data and information of the same kind, and little else. This is because in policy-making such bureaucratic currency — some people call it facticity — does not simply describe the social order, but rather it *constitutes* it. Our understanding of social and economic affairs is heavily influenced by official information which, whether we know it or not, may often tell us more about the politicians and agencies that propagate it than about the conditions it purports to describe and analyse.

In a nutshell, the problem of the official secret is not just that it is *secret* but also that it is *official*. The bureaucratic way is not the only road to truth. There are, if you like, more things in heaven and earth than are dreamed of in the philosophy of the decision-maker who knows but who will not, cannot, learn; or, as someone has put it, who will not step away from the computer terminal long enough to talk to people. What is needed is not just more public availability of official information, not just a broader exchange of information for policy debate, but also much more diversity in the type of data that is generated, and in the interpretations that are placed upon it. The two requirements are obviously related. But my point is that we cannot assume that in providing the first we will also guarantee the second. On the contrary, official information legislation may in one sense prove to be anti-democratic if it simply amplifies the voices of those who can understand and use specialised technical information while in effect — if not in intent — muffling further the voices of those who cannot. Bureaucratic conventional wisdom must be open to challenge, but not only from professional elites and the more powerful groups that can afford to employ them.

Those who do seek access to official information will tend to be those who can use it — and pay for it; those who are able to speak the professional language (although this may be less true in regard to personal information). Unless we are prepared to challenge bureaucratic and professional expertise as such, rather than just its particular content, an Official Information Act may help solidify a new structure of political inequalities by reinforcing a system of esoteric policy-making that spirals above and beyond the capacity of most people to comprehend it. The role of the news media is crucial in helping to moderate this effect.

Open government then is not just about cobblers and their lasts. It is also about those who feel — who know — where the shoe pinches. It seems to me that for many groups in society such knowledge in no way constitutes power. If the participatory purpose expressed in the Act is to be fulfilled in the broadest terms it will somehow be necessary to confirm the proposition that ultimately there are no experts in government, only citizens. It will be necessary to acknowledge that the non-

expert, the less-educated, the poet and the artist if you like, have as much to contribute to public policy-making as the engineer, the social scientist, the economist and the policy analyst.

The title of this convention asks whether the Official Information Act is a panacea or a placebo. I believe that it is neither. It is merely a possibility.

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The Australian Freedom of Information Act: A Personal View

Brian Candler

Despite obvious bi-partisan support in Australia for the essential principles which underlie the *Freedom of Information Act 1982* (the FOI Act), the more ardent protagonists of this legislation have often portrayed its development and implementation as a battle between the public and the bureaucracy, with the politicians as either innocent bystanders or the victims of manipulation. This portrayal is clearly an oversimplification which fails firstly to distinguish between politicians who are part of the executive and politicians who are solely parliamentarians. Secondly, and more importantly for what I wish to say about the bureaucratic reaction to the legislation, it fails to recognise a diversity of views amongst public servants.

The open government philosophy which underlies the FOI Act and the other statutes that have come to be known in Australia as the "new administrative law" is an attitude which of itself cannot be created by legislation. Legislation cannot erase the habits of 30 or more years. The most legislation can do is to provide an environment in which a new approach to public decision-making can grow and flourish. There is, of course, a highly respectable argument that the FOI Act, and indeed the new administrative law as a whole, is a response to a changing political and social environment — a changing environment not reflected by our traditional notions of Westminster government.[1]

But before I pursue that thought in detail, I will sketch a brief history of the "new administrative law". In this I will refer to three other Acts — the *Administrative Appeals Tribunal Act 1975*, the *Ombudsman Act 1976*, and the *Administrative Decisions (Judicial Review) Act 1977*. These Acts are essential parts of a package of legislation designed to make federal government decision-making more open and accountable. The FOI Act's role in that package is slightly different from that of the other three. Whereas they provide machinery for an individual to seek redress of a particular grievance, the FOI Act's role is to provide what might be described as a "window on government", so that with as much in-

Brian Candler is an unattached officer in the Australian Commonwealth Attorney-General's Department, and was formerly a Principal Legal Officer in the Department's Freedom of Information Branch.

formation as possible electors may make that ultimate judgement about the worth of a government.

Freedom of information arrived on the Australian political agenda in 1972 with the election commitment by the then Labour Opposition to implement such legislation along the lines of the United States model. A very early act of the Whitlam government was to establish an inter-departmental committee. This committee acquired the services of a consultant — a former American Department of Justice officer who had worked on the implementation of the United States Freedom of Information Act. The committee's report was tabled in the Senate in December 1974. No further progress was made during the life of the Whitlam government. However, the Liberal policy speech for the December 1975 election contained a commitment to FOI legislation.

In August 1975 the Administrative Appeals Tribunal Act received Royal Assent. The Act was to come into force on 1 July 1976. On taking office after the December 1975 election, the Fraser government appointed a new inter-departmental committee. Its report was tabled in the House of Representatives in November 1976. Public debate on FOI had by this time heightened somewhat, especially with the assistance of a draft Bill contained in the Minority Report of the Royal Commission on Australian Government Administration — also published in 1976. Additionally, December 1976 saw Royal Assent for the Ombudsman Act, which was to come into force on 1 July 1977. An FOI Bill did not emerge until June 1978; but in June 1977 the Administrative Decisions (Judicial Review) Act received Royal Assent.

The FOI Bill 1978 was introduced into the Senate on 9 June 1978. The Bill and the second reading speech were in fact tabled by leave on the last sitting day of the autumn session. The Bill was accompanied by a ministerial statement on access to official information. In a departure from the usual practice of that time, the final draft of the Bill, the second reading speech and the explanatory memorandum were submitted for approval to the cabinet. The 1978 Bill was referred in September 1978 to the Senate Standing Committee on Constitutional and Legal Affairs (the Committee's report is often referred to as the "Missen Committee Report" after the then chairman, Senator Allan Missen). The committee's report, containing 93 recommendations in respect of the FOI Bill, was tabled in November 1979.[2] The Attorney-General gave the government's response to that report on 11 September 1980:

> *"The government and the (Missen) committee are agreed on the basic concept that a Freedom of Information Act should provide a right of access to government information except in those cases where the denial of access can be justified by reference to a positive provision of the law. This is, of course, a radical change to the present position which is that, in most cases, access to government documents is the discretion of minister or officials and there is no general right of access. The rationale for the basic concept reaches to the foundations of our democratic government. In a parliamentary democracy the executive government is accountable to the Parliament and through the Parliament to the electorate. If the electorate*

is to make valid judgements on the performance of its government it should have the greatest access possible to information held by Government."

This explanation of the philosophy which underlies the FOI Act has not been disputed.

Less than a month after this statement the Administrative Decisions (Judicial Review) Act was brought into operation on 1 October 1980.

The 1978 Bill lapsed with the general election of October 1980. The FOI Bill 1981 was introduced into the Senate on 7 May 1981. After what might be described as a revolt by government backbenchers, and a compromise by the government, the Bill passed the Senate on 12 June 1981 — the last sitting day of the autumn session and the last sitting day before the government lost its majority in that House. The Bill passed the House of Representatives on 24 February 1982 and, after the passing of two possible dates of commencement, was brought into force on 1 December 1982. A Bill to amend the FOI Act 1982 was introduced into the Senate on 2 June 1983. The government intended that it should remain over until the present Budget sittings, be proceeded through all stages in those sittings, and be brought into force as soon as possible.

Having canvassed the political history of the FOI Act, I would like now to canvass, again briefly, the administrative history. But first I should briefly explain my own involvement and capacity to comment. I joined the Administrative Law Review area of the Attorney-General's Department in May 1978 and assisted peripherally with the preparation of material for the Missen committee. For a period I performed other duties which took me away from FOI until the government's response to the Missen committee report was being prepared in early 1980. From the middle of 1980 until May of this year I worked on little else except FOI.

The first inter-departmental committee on FOI established by the Whitlam government consisted almost entirely of the key policy departments (Prime Minister and Cabinet, Foreign Affairs, Defence, Attorney-General's and Administrative Services, plus the Public Service Board). The client departments (such as Social Security) or the business departments (such as Trade) were not represented. The same agencies constituted the second such committee on FOI.

When it came to the taking of evidence by the Missen committee each agency prepared its own submission. The Attorney-General's Department prepared several papers on particular legal issues, and the Public Service Board carried out a survey on anticipated effects of the legislation on behalf of the committee. The committee thus received a wide cross-section of views, although it must be said that public service witnesses obviously felt constrained by the fact that the underlying philosophy was government policy. Equally, it can be said that those public servants who opposed the policy modified the way in which they articulated this opposition. Arguments which highlighted the costs and the administrative difficulties in implementing the government's policy were brought to the fore, rather than arguments directed at the philosophy underpinning the legislation. Certain of the co-ordinating departments did, however, continue to attack the policy on the grounds that it would destroy the basis of Australia's Westminster system of responsible government.

After the 1978 Bill was introduced and prior to the government's response to the Missen committee's report in 1980, the Attorney-General's Department paid little attention to implementation and training. The occasional seminar was given at the request of particular agencies. For example, the then Director-General of Health arranged for every second division officer in his department to attend one of two half-day seminars conducted by two Attorney-General's officers. By contrast, certain co-ordinating departments (still hoping the "nightmare" wouldn't materialise?) ignored the issue. Lectures on FOI were also occasionally included in Public Service Board-sponsored seminars and courses. The approach by the Attorney-General's Department was to use these occasions to explain the philosophy of the legislation and to outline the broad provisions of the 1978 Bill. This *ad hoc* approach continued through the period between the government's response and the introduction of the 1981 Bill. There were two reasons for this. Firstly, the Attorney-General's officers were unclear as to how much they could say in open fora while the legislation was still being developed. Secondly, other agencies were dealing with more urgent priorities while they waited to see what happened. Intensive preparations for implementation were to commence after the 1981 Bill was introduced. They were, of course, disrupted by an uncertainty concerning the exact details of the compromise which would emerge from the Senate, and serious progress was not made until after the Bill passed the Senate in June 1981. Only then was the substance of the final legislation known.

On 28 July 1981 the Attorney-General's Department issued the first of its FOI memoranda. FOI memorandum no. 1 announced a training strategy based on the presumption that the legislation might commence on 1 July 1982. Before FOI memorandum no. 1 had been issued a series of seminars (from July to October 1982) was held in all state and mainland territory capitals to introduce some 850 senior officers to the broad philosophy behind the FOI Bill 1981 and to explain the structure and key terms of the Bill. These were one-day seminars directed at senior officers who would not themselves be responsible for the day-to-day implementation of the Act, but because they could be expected to supervise that implementation would need a grasp of the fundamentals.

With this series of seminars already organised, the training strategy announced in FOI memorandum no. 1 identified three key target audiences for training: (1) agency heads and senior officers; (2) agency staff involved in setting up FOI systems and procedures; and (3) training officers and other staff responsible for FOI training.

There was a clear expectation that the Attorney-General's Department, in conjunction with the Public Service Board, would provide a foundation on which individual agencies would build, in accordance with their own needs and expectations of what the legislation would bring.

In 1981 the first audience identified was dealt with in the one-day seminars already mentioned. They were to get further training immediately before the legislation came into force. The second and third audiences, referred to respectively as *implementers* and *trainers* (who in many agencies were the same people), were offered a series of four-day workshops conducted from October to December 1981 in all main-

land state capitals, and in Canberra. This programme reached approximately 510 officers in the junior to senior range of middle management. Because it was directed at the officers responsible for developing and introducing administrative procedures the emphasis was on administrative details and legislative requirements rather than on broad philosophy. Concurrently with this training effort, a number of bodies were established to assist the implementation process. The principal one was the inter-departmental working party. Its task was to oversee and direct the implementation phase. It consisted primarily of representatives of the Attorney-General's Department and the Public Service Board, but later the Department of the Prime Minister and Cabinet was represented full-time, and the Department of Finance became an active participant. To provide feedback to the working party and to be a forum for the exchange of information, an inter-agency consultative committee was also established. This body was intended to represent a cross-section of agencies which were expected to have substantial involvement in FOI matters. Included among them were agencies carrying responsibilities for social welfare, law enforcement and security matters, as well as agencies characterised by differing organisational structures, i.e. highly decentralised departments, and a large statutory authority. The working party met about fortnightly to keep progress under active review, and the consultative committee met approximately monthly.

The statistics task group was also working under the auspices of the working party to devise a statistical and reporting system to meet the requirements of the Act, particularly section 93. The detailed reporting requirements of section 93 might be seen as the parliamentarians' answer to bureaucratic resistance based on cost and disruption. If senior officials were going to make unsupported (and possibly unsupportable) claims of dire consequences flowing from the legislation's introduction, then at least the parliamentarians were going to have the facts and figures for a proper assessment of the effect, whether or not the collection of those facts and figures could be justified on any cost-benefit basis. The group established to reduce the demands of the Act to manageable proportions consisted primarily of Attorney-General's and Public Service Board officers, assisted on occasions by the Australian Bureau of Statistics. The task of developing a statistics system which would not itself prove to be the single largest consumer of FOI staff resources was not easy, but after a couple of false starts the object was ultimately achieved.

By March 1982, the Attorney-General had issued a press release saying he was pursuing 1 July 1982 as the date for the implementation of the FOI Act. Unfortunately, a revised date of 1 October 1982 had to be announced on 5 April 1982, and it was not until 23 November 1982 that the 1 December 1982 Proclamation of the Act could be announced. These false starts had two effects. Firstly, they gave continued hope to those who wished the Act might never come to fruition. Secondly, they meant that activists within slow-moving agencies built up to one target only to find it dissipate. As a result, when trainers or implementers tried to bring their difficulties to the attention of senior management the latter tended to regard preparation for FOI as a lower priority that could be dealt with later. This attitude at senior levels did not change markedly until as late

as September/October 1982. By then the Attorney-General's Department and the Public Service Board were into the final round of training.

In June 1982, the Attorney-General's Department announced a second series of seminars — one for senior decision-makers, and one for officers having supervisory responsibility for the collection of statistics. Formal nominations were requested in late July. The response was such that more seminars than originally proposed had to be offered in a greater number of cities. A revised programme was announced in August. In all, 36 one-day seminars were conducted in all mainland state capitals and in Canberra from mid-September until late November. The objective was to acquaint (re-acquaint in some cases) senior officers with the broad implications of the Act and to provide them with an understanding of the principal issues they might face when making decisions in terms of the Act. The assumption behind the one-day seminar was that officers at senior levels would receive recommendations from technical experts at lower levels (the "implementers" previously trained in the four-day workshops), and that in their capacity as review officers they would have the issues fully canvassed in review submissions. Accordingly it was felt that principles and issues, rather than practices and procedures, were important to this group. More than 2,000 officers attended these seminars, including six permanent heads, the Chief of the Defence Force Staff, and 636 officers of senior executive status in the public service or of field rank in the armed forces. The middle management officers by and large were more senior than those who attended earlier seminars. Representation covered 129 agencies. Some 345 officers attended the statistics seminars, which were intended to ensure that officers responsible for supervising the necessary statistical/reporting systems were conversant with both central requirements (i.e. the items which needed to be collected for the Attorney-General's report to Parliament), and individual agency responsibilities — given the government's commitment that certain details on FOI operations would need to be included in each agency's annual report.

This combined series of seminars evidenced a change of attitudes. In the late 1981 series of seminars, through aggressive questioning of the presenters some officers showed their dislike of the policy underlying the legislation. By late 1982, the truly professional public servants (the vast majority) had accepted that the policy was to be implemented, and questioning was directed at obtaining an understanding of an agency's obligations and the practical administrative effects of those obligations. It was also pleasing to note in this series of seminars that most participants had acquired a basic knowledge of the Act.

Other aspects of training which should be briefly touched upon are training for ministerial staff, and intra-agency training. In November 1982, two half-day seminars were conducted for the staffs of ministers. Over 90 ministerial officers and departmental representatives attended. Interestingly enough, this proved in some cases to be the first contact between ministerial staff and departmental FOI officers. After a survey of agencies conducted in January 1983, the Attorney-General's Department was able to conclude that a large number of agencies, approximately two-thirds of those responding, had conducted quite intensive training

programs for their staffs in both their central and regional offices. The training had consisted of internal lectures and seminars specifically on FOI, circulation of explanatory material, introduction of FOI bulletins or circulars, external seminars conducted by academic institutions, and the introduction of FOI segments into established training programmes.

The publication of explanatory materials was an important aspect of the implementation process, from the point of view of the Attorney-General's Department. Its main effort in this direction was the FOI memoranda series. These memoranda were (and are) issued to explain to agencies subject to it the general application of the Act's provisions. Because they represent the official view of the Attorney-General's Department on particular aspects of the legislation, their drafting is (and was) a painstakingly careful process, very costly in time and manpower. The memoranda on substantive issues were consolidated into a publication entitled *Guidelines to Freedom of Information Act,* and that volume was made available for sale in the government bookshops. This publication, suitably enlarged and updated, will form the back-bone of the FOI handbook which will be issued when some experience has been gained in the practical operation of the Act. Of course, implementation of the FOI Act did not cease on commencement day. In fact the problems multiplied — not only because certain persons who never really expected the legislation to come to fruition now faced an unpleasant reality, but also because of the inevitable teething problems associated with such a new Act. One institution which was started just before commencement has been and continues to be of importance. The FOI Practitioners' Forum, sponsored by the Public Service Board, began in October 1982 as a monthly meeting for FOI contact officers to get together to discuss problems and exchange ideas. If it serves only to stop the wheel being repeatedly reinvented and to provide comfort to FOI practitioners in hostile environments it will have served a useful purpose. The FOI memoranda series remains, and even when the FOI handbook is completed it can be expected to continue as an advisory service on common problems, a case notes service and a vehicle for disseminating those legal advices given by the Attorney-General's Department which are seen as being of general application.

The dire predictions of floods of FOI requests did not eventuate. The Immigration and Ethnic Affairs Department, for example, which predicted more than 100,000 requests per year had received at the end of seven months a total of 448 requests. It must also be said, however, that a number of the requests received by many agencies have been far from routine. At this early stage while agencies are still on the learning curve it is difficult to generalise and conclude that FOI administration will become routine and therefore more expeditious. Nevertheless, I firmly believe this will prove to be the case. I also believe it must be said that a lot of manpower currently being used is being wasted by some agencies which appear to be using some procedural restraints (those designed to avoid the overtaxing of limited resources) to deny access which ought to be given. It seems that the very agencies who argued most strongly for no prior access, workload tests and the like are now spending too much time, often the time of senior officers, arguing technical points where the

least costly and administratively most simple course — one entirely consistent with the spirit of the Act — would be to grant access. A celebrated example of this concerns the Department of the Treasury, which engaged a Queen's Counsel of the Melbourne bar to appear in Canberra at a preliminary conference before the Administrative Appeals Tribunal where the point at issue was access to prior documents. A number of the early cases before the Tribunal have involved unnecessary refusals of access to prior documents. This problem should be overcome by the proposed amendments now before Parliament.

The reference to the proceedings under the Act allows me to draw attention to a real difficulty that the Attorney-General's Department has had both as the department administering the Act and as the normal source of governmental legal advice. This is in the area of co-ordinating the legal arguments to be put to the courts and tribunals. The responsibility for making decisions under the FOI Act lies with the agency to which the request for access is made. Being the agency which has made the decision which is subject to review by the courts or the tribunals, it is the party in the review action — not the Attorney-General's Department. That department does, however, have a real interest, both as the department reesponsible for the administration of the FOI Act and as the principal provider of the commonwealth's legal services, to ensure a consistency of argument before the courts and tribunals. Only in one case so far has counsel for any agency found himself putting mutually exclusive arguments, and as yet the Attorney-General has not found it necessary to use his power to intervene in Administrative Appeals Tribunal proceedings.

But there have been parliamentary questions and press comment as to whether arguments put by certain agencies are consistent with the government's commitment to the philosophy of the legislation. There have also been some strong words and intense activity to avoid public disagreement in the review fora.

Prior to the Act's introduction certain senior officials were saying the government of the day did not understand the consequences of such legislation. These officials seemed to see it as their role to protect the government from itself. Now this arrogant attitude is expressed when it comes to deciding the application of particular exemptions. The application of exemptions is approached on the basis of what the applicant is perceived to want the information for, and not on whether the harm the exemption is intended to prevent can reasonably be expected to occur. Such views and methods of operation, ingrained over many years, will no doubt continue in some officers even though in respect of material actually released the "dire" consequences they predicted have not eventuated.

What conclusions do I draw from my experience? Firstly, from the point of view of getting a statute on the books and preventing bureaucratic rearguard actions, the then Opposition made a fundamental mistake in forcing the reference of the 1978 Bill to the Missen committee. Speedy enactment of that Bill with all its weaknesses, perceived and real, would have prevented a lot of prevarication. By now the much touted three-year review would be well advanced and we could be considering amendment

of the Act on the basis of experience rather than continued speculation. Secondly, internal public service opposition is mainly a factor of length of service. By and large I could anticipate the resistance I would receive from an audience by the number of balding or grey heads — irrespective of level of status. For example, a Canberra audience of senior level managerial officers (generally aged in their mid to late-thirties) was more receptive than a state/regional office audience of junior/middle level managerial officers in their late fifties. Given the history of the other elements of the new administrative law package this response was hardly surprising. Thirdly, this divergence of attitude put real pressure on those committed FOI officers who gravitated, rather than being pushed, into FOI implementation positions. These officers were (and are) middle to senior level managerial officers with personal ambition and good career prospects of becoming the next generation of senior executives. They are therefore relatively young with much skill and high motivation. They find themselves sandwiched between, on the one side, peers in both state and central offices who are accustomed to a particular mode of doing business and who want a comfortable passage to retirement, and on the other side senior officers who, when not actively hostile, often genuinely believe that the new administrative law is a luxury the government cannot afford during a time of economic restraint. Consequently the false starts and delays put an added burden on these officers. Through no fault of their own they were seen to be crying wolf too often.

Penultimately, and in a sense this is the point with which I started, the FOI Act cannot change the habits and thought patterns of a working lifetime. If during all your working life you lived in the shadow of an Official Secrets Act and a philosophy of "it's for us to know and them to find out", FOI legislation is uncomfortable. If you accept that the Westminster model represents a reasonable picture of what should and what does happen, then direct access to official files and the direct accountability of individual public servants to the public will be unacceptable. You are probably an officer with 20 or more years' service and, to use a phrase coined by one of my Public Service Board colleagues, you are probably "totally unreconstructable". If, on the other hand, you accept a view that public administration should be open and accountable to the greatest extent possible, an FOI Act will seem logical. You are probably also of the view that the Westminster model is not only inadequate, it is a positively misleading model; and, in any event, it is irrelevant to whether or not FOI legislation is desirable. Whichever of these views you might hold, be assured you have counterparts in the Australian commonwealth public service. My experience is that the shorter the period you have been a public servant the more likely you are to adopt the latter views. Nonetheless, if you were an Australian public servant who could not embrace those views, you would still have to accept their integration into the political ethos as inevitable. And if overall you were to take a genuinely professional approach no matter what your view, you would have to concede that the balance between disclosure and secrecy has changed. The balance now achieved is neither complete openness nor complete secrecy; and disclosing that which should not be disclosed is just as bad as hiding that which should be exposed.

Finally, it is my belief that whatever the cost is alleged to be, no one in fact really knows. From the American experience it can be said that the outgoings were grossly underestimated, but I have yet to see a cost-benefit analysis that weighs the tangible improvement in public administration and the intangible improvement in the public perception of the civil service. From the Australian experience to date it can be said that certain claims were clearly outrageous. Others may yet be fulfilled. A reasoned debate on cost and benefit will, I think, have to await a major review of the legislation. But on a personal note, I believe the cost so far and the expected costs as I perceive them are a small price, in the overall budget outlays, to pay. I say this because I perceive two primary benefits essential to democracy. Firstly, the greater knowledge of government practices and performance facilitated by the FOI Act will enhance both the performance and the legitimacy of executive government. Secondly, the new administrative law mechanisms, which recognise the importance of the individual in our pluralist society, are essential to the maintenance of a proper balance between the individual citizen and the state.

References

1. See, for example, L. J. Curtis, "Freedom of Information in Australia", paper delivered to the seminar on Access to Government Information, Australian National University, 27 - 29 May, 1983.
2. Report by the Senate Standing Committee on Constitutional and Legal Affairs, **Freedom of Information** (Parlt. Paper 272/1979), "Missen Committee Report".

Discussion

Brian Candler, speaking to his paper

Because of the election in 1980, the 1978 Bill lapsed and the government introduced a new Bill in 1981 which was revised to take account of those changes it was prepared to make. The Liberal government had lost control of the Senate in the previous election, but that didn't take effect until the end of June 1981. And they were keen to get the Bill through the Senate in an acceptable form. But they had on their hands the revolt of their own backbenchers in the Senate, led particularly by the Liberal members of the Senate Standing Committee. One key issue was whether decisions on particularly sensitive documents (defence, foreign relations, etc.; so-called internal working documents; and cabinet, executive council documents) ought to be solely in the hands of the ministers, or whether there should be some form of external review. We have in our legislation what is called a conclusive certificate (which, in effect, is not conclusive because it is subject to review, but a very much more limited form of review than for most other decisions under the legislation). On that issue the government conceded a Document Review Tribunal.

Another key issue was work-load. The American experience had been quite disastrous back in the late 1960s, when particular interest groups had made requests for large volumes of documents. The example that is often cited is the request for the Rosenberg papers, and the fact that the FBI claimed it had to bring 450 of its operatives out of the field to deal with it, which effectively meant that the Bureau was shut down for a period. Having learnt from that American experience we built into our legislation a number of work-load tests. One of them is that we have a 60-day response time instead of the American 10 plus 10. The other thing we did was to start with a clean slate on day one: there was to be no access to documents created prior to the coming into force of the legislation, with a minor qualification. Initially, it was intended that you could go back to a document that was reasonably necessary to the understanding of a docu-

ment which was in the access period. As a partial response to the Senate revolt, that was extended back five years in respect of documents relating to the personal affairs of the applicant. And that was a part of the other compromise, which resulted in the section permitting the correction of personal records in certain circumstances.

This year the incoming Labour government, having made in opposition a number of statements about why the Act was too narrow, introduced an FOI Amendment Bill. This should not be seen as a Bill to correct faults already found. Rather, it is to honour an election promise. Any correction of "faults" in the Act should come in the three-year review agreed to by both sides in Parliament.

Now I come to the implementation of the Act. The point I should like to emphasise here is that legislation such as this, based on the philosophy that government should be more open and more accountable to the electorate, really can only provide an environment in which public servants of a particular attitude operate more freely. The longer you live in a system the more you find it difficult to change even if that system changes around you. I suspect that in Australia at least we are now living through "a quiet revolution" in public administration; and five or six years from now we will wonder what all the fuss was about — possibly because those who have been making the fuss will have retired.

Between the introduction of the 1978 Bill right up until the Senate compromise our implementation programme was, to say the least, spasmodic. Such literature that we put out was fairly general, dealing with the philosophy of the legislation rather than with the procedures that the legislation would require. It discussed things like where the proper balance should be drawn between the confidentiality of government and the openness of government. We were keen to stress, as we still are, that this legislation is not solely about openness, it is about finding the right balance between what is proper to give out and what is proper to retain.

FOI is unique legislation in the sense that all other legislation has a department which is responsible for its administration. Because every agency subject to FOI is responsible for the administration of the Act there was a need to get some consistency of approach. Our FOI memoranda were designed to achieve this. However, we had only one year between passage of the legislation and its commencement date. Therefore the decision was made that we wouldn't attempt to train the whole service. We would provide the where-with-all for individual agencies to gauge the sort of training they needed themselves. So we picked on two groups. The *implementers* were the people who would be responsible for setting up the systems in the individual agencies. And these systems would vary tremendously: a place like Social Security — a department of 16,000 people and 164 regional offices — was going to need a system vastly different from the Honey Board of five people, who probably wouldn't get an FOI request for five years. We were flooded with requests, and had to put on more seminars than we intended, in more places than we intended. In fact we went to every mainland state and territory capital. In parallel with this we tried to get across to *trainers* — training officers within agencies — the essential principles they would need to disseminate to make their organisations aware of the legislation.

Then about three months before the legislation was due to come into force we were at last able to interest senior management. We did the second series of seminars, directed at middle to senior level officers. As far as we know this has been the only campaign of its type in the Australian public service. It was a very determined effort to make sure that this legislation was known, and that it would come into effect fairly smoothly.

What has happened since the Act came into force? To date we have had about 5600 requests — approximately 800 a month across the whole bureaucracy. 75 per cent of agencies have not received one single request, but every ministerial department and all the major statutory authorities have. Two-thirds of all requests have been made of four agencies — Social Security, Veterans' Affairs, Taxation, and Immigration and Ethnic Affairs. Current predictions are for 10,000 requests in the first year, whereas our original estimate was of 50,000 to 100,000 requests in the initial 12 months. This experience is consistent with that under the Administrative Decisions (Judicial Review) Act where reasons can be requested.

There had been dire predictions about how the bureaucracy would stop working while officials spent their time writing reasons for decisions. In the event, however, there were very few requests for reasons for decisions, and there are only 13 applications to the court in the first year. During the first six months of FOI there were 62 appeals to the Administrative Appeals Tribunal, or just over one percent of all requests. Percentage-wise this is not a large number, but it's still a significant work-load for the Tribunal.

Costs have always been one of the big issues. Generally, those who could no longer argue the philosophy once it had become integrated into government policy, found it convenient to use costs as a way to continue their opposition. It is too early to say whether the costs have been understated or overstated. But I can say that for the year ended 1983 the equivalent of 685 full-time staff positions were allocated for FOI administration — in our terms the size of a small ministerial department. But for the year ended 1984, that number has been reduced to 399. Those four agencies receiving the bulk of the requests, plus two others, accounted for 472 of the 685 positions bidded for in 1983, and 205 of those positions were not taken up in the 472. So you can see that in those client-oriented agencies there was gross over-bidding for staff. But then in defence of my colleagues I must say that despite the apparently low number of requests the complexity of them has been greater than anticipated, and thus the staff numbers bidded for have not dropped as significantly as might have been expected from a simple comparison of anticipated and actual requests.

All I have just said relates to the commonwealth system. In conclusion, I should like to refer briefly to the state administrations. So far there is only one state that has an FOI Act, Victoria. That Act came into force in July this year. By and large it follows the commonwealth model, but it goes a little further: they use their ombudsman with direct access to their Supreme Court, whereas the commonwealth has a much more complex appeals mechanism through its Administrative Appeals Tribunal, the use of the ombudsmen and the Federal Court under the ADJR Act.

Just last week the Governor's speech in New South Wales contained a commitment to Freedom of Information legislation — before the end of the year. It is to be based on Professor Wilenski's draft bill contained in his report of a couple of years ago on public administration in New South Wales. That would make it a substantially different piece of legislation from both the commonwealth and the Victorian Acts. A key difference is that that draft includes a 21-day response time, compared with the Victorian one (45 days) and the commonwealth period of 60 days.

In the other states there is so far no public commitment to FOI. I understand that it has been discussed at a party political level in South Australia; and without naming them I think there are a couple of states in the Australian commonwealth where you wouldn't expect it to be discussed at all.

Chris Burns (State Services Commission)

Have you discerned any tendency for the departments actually to provide information without being asked for it in the first place?

Brian Candler

Yes. The requirement to give reasons under the ADJR Act now often means that decisions — for example, you can or cannot have your permit — are accompanied by an abbreviated statement of reasons that would not have been there before. These may not be of the depth and breadth that would be required if the person came back and *formally* asked for a statement of reasons under the ADJR Act, but they're enough to satisfy people that they don't need to make a formal request. That's a clear example of an Act having an educative effect, if you like. FOI seems to be having the same effect but it's not as explicit as under ADJR. But I go back to what I said about the bulk of total requests being made of those four client-oriented departments. Social Security and Veterans' Affairs would say with some justification that even prior to FOI they were being open-handed with their clients. By and large that was departmental policy; but what the troops out in the sticks were doing might have been different from what the central office thought they were doing. Now at least it's official policy across the

board. The Taxation Office would say the same thing, and for the first five months they were running nicely at about 100 requests a month. Then we got the bottom-of-the-harbour legislation, which was designed to recover tax from those people who dealt with companies having tax liabilities by depositing their accounting records in the murky waters. One of the promoters of a bottom-of-the-harbour scheme developed an "escape kit" to delay collection of the avoided tax. A part of this was to make an FOI request. In one month FOI requests to the Australian Taxation Office went up 300 percent.

John Robertson (Consultant, formerly Secretary for Justice, and a former Secretary of Defence)

I was interested in the comments about changing attitudes, and about a revolution in public administration thinking. Those are good points which also apply to New Zealand. It is quite clear that it is a revolution of a major sort when you look at the traditional development of the public service over the last 100 years. It was only in the 1960s that I heard a most respected commentator on public administration still saying that one of the greatest principles to be preserved under the concept of ministerial responsibility was the anonymity of the official. Now, one way to remain anonymous is to make sure that no information gets out about you, and that the only information to get out is that which makes the minister look good. The older generation has been greatly influenced by that concept and it is only in the last 20 years that we have come to break it down — largely under the weight of government's huge size in this society, which has meant that ministers can't handle everything. So it requires a bit more than pointing a finger at somebody and telling them they must have a different attitude on Monday morning when they report under the new Act. It's now a matter of getting official attitudes altered as a response to changing expectations in the environment.

Brian Candler

I wouldn't disagree with anything you have said, but I would like to add just one point to that. One of our colleagues recently pointed out to us that what we were doing as public servants in this area of administrative reform, with our sense of mission, was stealing from politicians their right to make policy, their right to be seen to be doing things. We were the ones who were seen to be doing things and to be dragging politicians along. I don't think that's the case. Rather, administrative law usually changes as a result of changes in community attitudes.

Warren Page (*The Evening Post*)

Have Australian news media people made it known to your Attorney-General's Department how they see the Freedom of Information Act being administered?

Brian Candler

You can probably hear the yawn across the Tasman. There has been only one journalist — he's in Canberra — who has used the legislation vigorously. He has made 90 requests, and he's quite blatant about why he's done it. It takes very little work on his part to get the bureaucracy running around in circles, and he is trying to drum up a news story about how stick-in-the-mud and uncooperative the bureaucracy is, and he's not getting very far. Only one permanent head has "assisted" him. Just the other day one of my colleagues was musing about how the newspaper can afford to let this journalist spend this amount of time and money on such an unsuccessful campaign. But I think it's the American experience also that the time-frame is unsuitable for the press, even for investigative journalists who have got more time. In *All the President's Men* Woodward and Bernstein say they used the FOI only to get footnotes or documentary proof of things they already knew from Deep Throat.

Cheryl Campbell (National Archives)

What we expect will increasingly happen is that material will never make it on to the files, or will be taken off files before access is granted. We have an Archives Act. What protection is there in Australia? Or is there no problem?

Brian Candler

I see a problem at the margins. You can deduce from the American and Canadian literature of late that there are people at one end of the spectrum who are simply not putting things on file, or are attempting to keep parallel files, and so on. They are a small minority. At the other end, there are people who are tracing their footprints in so great a detail that files are expanding rapidly. But for the majority in the middle it has made no difference. In Australia those who are creating huge monolithic files say they are doing it under the pressure not of the FOI Act but of the AAT and ADJR Acts. But to my knowledge there has been no evidence of parallel files, no evidence of ripping things off files. A criminal provision in the Archives Bill now before the Australian Parliament provides protection against this sort of thing. Records can be destroyed only with the permission of the Director-General of Archives. There are also provisions in the existing Crimes Act, but it would probably be difficult to prosecute under these.

Patrick Millen (Secretary of the Cabinet)

I am curious to know why your training programme started at the bottom and went up. I ask that question because we have taken the opposite approach, starting with the permanent heads and then working out from there.

Brian Candler

In a sense we did both. The 1981 seminars were directed at very senior people. Permanent heads didn't show much interest, but a large number of second division officers did. There was a seminar on the Act for permanent heads, and our own went along and talked to his colleagues on it, but that was done fairly late in the piece. Once we got to the second round of seminars, we thought it was better to start at the bottom because those were the people who were currently interested. We were having a great deal of trouble right up to the Act's commencement convincing people at very senior levels that it was something that was going to happen, and that they needed to be interested in it. But their attitude was, "that's tomorrow's priority; I've got other things to do today".

Robin Williams (former Chairman, State Services Commission)

I detected in the earlier comment about the need for public servants to become less anonymous, and in your reply, a suggestion that one could only go a certain distance down that road. That may reflect the fact that whereas New Zealand public servants have largely been anonymous, a number of top Australian public servants have been anything but. Indeed, some have been seen to be much more powerful than their ministers. I wonder whether the move away from anonymity goes along with a greater desire on the part of ministers to have more involvement in the appointment of senior public servants, and all that that implies. I am interested to know whether you are speaking from experience as an Australian in this rather than as an official involved with FOI.

Brian Candler

I find it difficult to separate the two. It is true that we have had some very visible permanent heads — some would say aggressively visible permanent heads. We have also had some very public divisional heads. The problem that I was trying to explain is that if as a technical expert you are involved in "selling" a government policy, whether or not you agree with it you become associated with that policy. Therefore if the policy itself is unacceptable to certain people you incur the displeasure of those people; if it's pleasing to them you attract their goodwill. It must place a lot of strain on the professional integrity of public servants who find themselves fundamentally opposed to the policy the government of the day is trying to implement. But it is one of the problems that has to be worked out if you accept that official anonymity is disappearing. I personally don't have any pat answer to it.

Patrick Millen

I wonder whether there has been any fundamental change within the Westminster system. Certainly, the complexity of government has forced officials out into the open more, because they are often the people who have to explain things. But I wouldn't be greatly alarmed: they understand that it is possible to serve the minister with loyalty even in matters where they might be in intellectual disagreement.

Brian Candler

Can I do what lawyers do when they are not sure of an answer — refer to a couple of cases? They reinforce the point you are making. In the mid-1960s when there was a problem about importing aircraft into Australia to break the two-airline policy, there was a High Court case about a decision made by the then Director of Civil Aviation. There was no stipulation in the legislation about the criteria he should use to decide whether a person could import an aircraft or not, and he openly said that he was doing it because of the government's commitment to the two-airline policy. In other words, he was exercising a discretion which was vested in him personally, subject to government policy. The court found that it was proper for him to take into account government policy, and it didn't overturn his decision. About two years ago the government of the day had a very clear policy of interpreting against school leavers receiving unemployment benefits the work test found in the social security legislation. The then Director-General of Social Security was taken to court. He rehearsed the factors that the Act required him to take into account in making his decision, but also said that there was a government policy which he had taken into account. His decision was overturned. As a lawyer I can distinguish between those two cases, purely on the grounds that in one there were no legislative criteria, while in the other case there were. But I think they also illustrate a constitutional development in regard to the importance that the court placed on ministerial policy in the two cases. It is now much more clearly recognised that certain decisions are vested directly in public servants, and their ministers have very little or no say in how those decisions are taken. That to me is a good reason why there ought to be direct public access to government officials.

The Official Information Act 1982

Ken Keith

Opening a conference a few months ago in Canberra on freedom of information, the Governor-General of Australia, Sir Ninian Stephen, quoted some lines from *The Chorus* in T. S. Eliot's, *The Rock*:

> *"Where is the wisdom we have lost in knowledge?*
>
> *Where is the knowledge we have lost in information?"*

Those words provide a sobering contrast to the often-quoted sentences from Milton's *Areopagitica*:

> *"Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?"*

Taken together, however, the message is that we should try to keep this Act in broader perspective. It is important that we don't get too buried in detail. So I shall here deal mainly with the general picture.

It is possible to argue that what we are involved in here is a major change in our constitutional system. Mr L. J. Curtis of the Attorney-General's department in Canberra, who with Mr Candler was a principal architect of the Australian FOI Act, has said that it may well be that open government is *the* constitutional development of the 20th century — what the franchise was to the 19th century — and that the spread of open government will effect changes as fundamental as those resulting from the extension of the franchise last century.[1] While he didn't say that that *would* happen, and while I wouldn't be bold enough to go that far either, I do see the changes as being part of a major shift. Certainly, I would emphasise the significance of the changes for the whole range of lawyers, including academic lawyers. I am not sure that this point has been taken sufficiently on board. What, for example, are commercial and tax lawyers to make of the provisions which give them access to the manuals, practices and precedents according to which decisions affecting their clients affairs are made? What advantages will they be able to get from the right of access to information relating not just to natural persons but also to artificial ones? What are the potentialities, for example, in the context of a dispute with the commissioner about tax liability, of the right to seek reasons? The official information developments, it seems to me, are part of a wider movement which throws

Ken Keith is a Professor of Law at Victoria University of Wellington, and was a member of the Committee on Official Information.

increasingly into doubt the rather comfortable lines that we have drawn between private and public law.

I propose to consider the issues under the following headings:

— The process of reform.

— Principle: that is, the basic principle of openness, which underlies the legislation.

— Protective criteria: the reasons for non-disclosure of information; and

— Processes for decision, not just in respect of disputes but in respect of other matters as well.

The Process of Reform

I begin with the process followed by the New Zealand reform, which leads on to a central feature of the Act.

The Committee on Official Information (the Danks committee) was established as a consequence of the report prepared by the Chief Ombudsman, Sir Guy Powles, on the New Zealand Security Intelligence Service. In his report Sir Guy noted that he had not been able to inquire into the security classification system. The system, he said, had a good deal to do with the personnel checking functions of the SIS. Accordingly, within the government there was a move to establish a committee to review the classification system and the *Official Secrets Act 1951*. At first a purely internal committee was proposed. Then it was suggested from within the bureaucracy that the committee should have a wider membership. There was also, potentially at least, a much broader context for the committee's work. New Zealand was affected by overseas developments such as Watergate, and by legislative proposals and discussions relating to freedom of information in Britain, Australia, and Canada. There were also debates on New Zealand foreign policy. But there were specifically local concerns as well. The government was becoming more involved in economic development, and the competing arguments between the proponents of "think big" and of protecting the environment led to demands for more extensive information. Accordingly, the original brief of the committee was substantially widened.

The committee had an unusual composition. It had six permanent heads (or their nominees) and two outsiders.[2] Like the Australian interdepartmental one, it was also unusual in its composition because of its emphasis on defence and foreign affairs. There were no public servants from the "home" departments, such as social welfare or health. The mixed composition pointed in itself to something of a departure from usual practice or convention, for it was contemplated from the outset that senior advisors would be giving public advice to their ministers on matters which they had not necessarily cleared or discussed with them. Later the committee emphasised that point by making it clear that it would also prepare, as part of its public report, a draft bill. That action might be contrasted with the protection often given in freedom of information statutes to draft legislation.

Overall, a principal advantage of such a composition of a committee is that if the proposals are generally acceptable to the public there is greater likelihood that ministers and departments will go along with them. The possible disadvantages are plain.

The committee called for and received submissions — from 130 individuals and organisations. About half of them came from outside government. Eighty of those groups and individuals were interviewed, and a series of newsletters was issued. The publication of the general report early in 1981 also allowed an opportunity for public comment on the proposals set out in it. Notwithstanding this procedure, the group was referred to as a "secret committee of bureaucrats meeting in secret".

The committee undertook a small amount of research, but as is characteristic of New Zealand law reform efforts, other people's work was important. This was especially true of the draft legislation being prepared elsewhere in the Commonwealth, and of the excellent studies being done at the time in Ontario. The draft bill which resulted from this process was adopted immediately by the government and introduced into the house in July 1981. The Bill had a slightly unusual character. It was a government Bill in the sense that the government was committed to its principles but it reserved the right to make changes, presumably of a detailed character, and it also said that departments would have the opportunity to make submissions to the parliamentary committee to which the Bill was referred. That in itself was an unusual procedure involving public debate among departments about the measure. The reason for this permission was that departments had not had the opportunity to comment on the Bill as it was being drafted. They had earlier had the opportunity to appear before the Danks committee and to get some idea of its preliminary thinking. The select committee stage allowed, once again, for a large number of submissions which tended to confirm the changing and developing public attitudes towards the issues. They also led to changes in the Bill, some but not all being improvements.

The main point that I wish to bring out of this process for present purposes is that the committee became more and more aware of the great difficulty in reaching final and acceptable views in respect of difficult areas of information, particularly those relating to economic development and the environment. Final views were possible in such areas but they would probably have been in terms of wide exceptions which would have excluded from public view much commercial information and much of the advisory process. The committee did not want to write hard-edged exceptions which would close up the areas that were under most substantial pressure. It also had considerable doubts about the viability of general answers which were supposed to apply across the whole face of government, and which were to apply into the future. In a sense, therefore, it considered that continuation and development of the committee processes were called for. Those processes would be informed by principle.

The Principle of Openness

The basic principle, as set out in Section 5 of the Act, is that information shall be made available unless there is good reason for withholding it. This principle is a reversal of that found in the now repealed Official Secrets Act and the replaced public servant oath.

Once it was possible to say that information — documents and so on — held by the government were the Queen's papers. She had her ministers, her privy council, and they were sworn to secrecy. On the other hand, it is possible to see government in a quite different light. It can be seen as the creation of the people, who participate in its doings and call it to account. It is, of course, that view which is apparent in the early provisions of the Act, which state the reasons for the basic principle. They are for the most part commonplace, but are still worth mentioning. As set out in section 4 they are accountability, participation, the interests of individuals who are directly affected by the information in question, and the needs of effective government. There are one or two other arguments for access but the above are the principal ones that have general application.

The effective government argument points to the advantage of reform, for ministers. It is important to realise that wider access to information is not just a one-way thing. The Minister of Finance, Mr Muldoon, in the 1980 Budget said that change requires public understanding and agreement on what are often complex and difficult issues. He said the government works to secure that understanding and agreement and to make these changes. That comment should be considered in the light of the very extensive role that government has in the lives of New Zealanders. As the first Danks committee report stated, history and circumstances give New Zealanders special reason for wanting to know what their government is doing, and why.[3]

The purposes of the Act and the principle underlying it will require continuing emphasis if they are to inform the on-going operation of the legislation. That is to say they don't cease to be relevant at the point when the Governor-General assents to the Bill. And their importance can be seen in part by the relatively unusual practice of Parliamentary counsel including a statement of purpose in the Act.

As you will know, however, under the New Zealand Act the principle does not lead to a general right of access in those areas where there is no "good reason" for secrecy. Here there is a departure from some of the overseas models where, sometimes subject to important exceptions, there is a right of access enforceable by independent courts or tribunals. However, the New Zealand Act does confer such rights in limited areas, which it is anticipated will grow.

The first area where there is a right of access is in respect of internal rules affecting decisions — manuals, for example. This right is subject to limitations but it is a major change in terms of individual access to "internal law". The second related right is that individuals are entitled to reasons for decisions which affect them. They are entitled to know what the findings were on material questions of fact, the information on which those findings were based, and the reasons for the decision or recommendation. Here again there is a major change in the law. There is also a slight irony in that while administrators are generally subject to

that obligation, courts and tribunals are not, at least in any extensive way. The third area where there is a right of access is that of personal information. The Act allows individuals to seek access to information held about themselves, so long as the information is readily retrievable. Related to that is a right to seek the correction of such information. Once again this represents a major change in the law.

A newspaper report I noticed the other day related to an appointment in the Ministry of Agriculture and Fisheries. An unsuccessful applicant applied successfully for some of the interview notes and other information that had been generated in the context of his application. The comments made by the officials involved seemed — if I may say so — eminently sensible. The first comment was that the unsuccessful applicant wanted this information because he might appeal against the appointment. The Auckland official involved said he could see nothing wrong with that, believing that such access might in fact reduce the number of appeals. The comment was made that people miss out not necessarily because they are considered to be no good, but because there is someone else who is considered better. A Wellington official who was quoted agreed that the interview notes were clearly something that that person was entitled to. As he put it, people doing the interviewing have got to be honest, record facts, and be prepared to stand by their judgements. He said they were accountable when discussing people and when making decisions. Those attitudes are what the Act is designed to encourage, and they can be traced back directly to the statute's statement of purpose.

The fourth major potential area of access turns on the progressive, programmatic nature of the Act. The Australian Act attempts to lay down in some detail the entitlements from the outset. The New Zealand Act by contrast envisages that there will be a progressive widening of rights of access to official information by way of regulations made on the recommendation of the Information Authority.

The legislation also requires the State Services Commission to publish a document including a description of functions of government departments and the other organisations covered by the Act. That publication will be of considerable practical importance in the Act's operation.

Protective Criteria

So we have then the principle of openness; and with it the countervailing considerations, the protective criteria. It is easy to state the general principle that information should be made available unless there is good reason to the contrary. It is much harder, once that has been done, to spell out in legislation the "good reasons" which justify the withholding of information.

In some ways the protective criteria are fairly well established in legislation around the world. The United States Act is in many ways the seminal statute. If you look at the legislation in Canada, at both the provincial and federal levels, and now at the Australian, Victorian and New Zealand legislation you get a similar list of exceptions, or interests that have to be protected. But there are some differences in the New Zealand legislation.

Protective criteria are sometimes applied to a particular substantive interest — for example, defence plans, or a company's trade secrets. We are concerned with the substantive interests not just of government but also of those who provide information to government. But we are also very much concerned with the processes whereby government decisions are made and information is generated.

The first section that is concerned with protection deals in various ways with New Zealand's security, defence, and international affairs. But then there is a second paragraph which says that there is good reason for withholding information if release would be likely to prejudice the entrusting of information to the government of New Zealand on the basis of confidence, by the governments of other countries. So the concern there is not with the *content* of the information. Indeed, the information might be innocuous. The concern is with the *process* of information flow from informants, in this case from government informants overseas. The Act is also concerned with the processes within the country and also, of course, within government itself.

The legislation's protective provisions therefore have a double focus: particular substantive interests, and process interests.

A second distinction which I think is somewhat more important in the New Zealand context than in others is a distinction between categorical definitions and consequential ones. Take for example cabinet papers which are exempted from much legislation applying overseas — including both pieces of Australian legislation. In terms of that legislation there is a category — cabinet papers — which is protected, and it is not possible to release particular documents on the ground that their disclosure would not cause any harm. A general judgement has been made that no such material should be released. The alternative form of drafting, found almost throughout the New Zealand Act, requires a finding about likely damage or prejudice. Thus cabinet documents *per se* are not specifically excluded by the Act. This form of protection, potentially at least, allows for wider access to information than does the former. It may also be significant for the process of resolving disputes about access.

Much of the legislation is drafted in the form of exemptions. If the information falls within the category or its release is likely to damage the protected interest then the Act does not apply. This is true, for instance, of sections 6, 7 and 8 of the New Zealand Act. But the most important list of reasons in the Act is that in section 9. Under that provision a finding of likely damage to a protected interest can be outweighed by "other considerations which render it desirable, in the public interest, to make that information available". Thus, it is not enough to show that personal privacy is being invaded; or that some confidence is being breached. It is not enough to say that the full and frank exchange of opinions within government is being damaged. Information will be released in all these cases if it can be shown that there is a stronger public interest requiring disclosure. In this third respect as well the New Zealand legislation differs from that elsewhere, again with possible consequences for the methods of resolving access disputes.

Another distinction can be drawn between the general and specific drafting of provisions in legislation of this type. Much of the New Zealand

drafting is in general terms. Consider, for instance, "public interest" (e.g. in s.9 (2) (b)), "substantial economic interests" (s.9 (2) (d)), "material loss" (s.9 (2) (f)), or "improper gain or improper advantage" (s.9 (2) (k)). Greater certainty could be achieved by removing the elements of judgement referred to above, but at an unacceptable price: the positive scope of the legislation would be drastically cut. Another way of achieving greater certainty is to draft in very great detail on the Swedish model. But a major thrust of the New Zealand legislation is that it is to provide answers over a period, by reference to changing circumstances and attitudes, and by reference to the particular facts in the area at issue. Acceptable, precise answers cannot be obtained at the outset. Above all, what is provided for is room for *judgement* in particular cases. Consequently, the protective provisions in the New Zealand Act are relatively brief, certainly shorter than similar provisions found in the legislation of other Commonwealth countries.

A further distinction can be made between the permissive and mandatory character of such protective provisions. The Official Information Act in general does not *require* the government to withhold certain information. Rather, it confers a *power* to withhold. It may well be that other statutes or an agreement with another country will require withholding. It is the case, for example, that the statistics legislation and the Inland Revenue Act require the Statistics and Inland Revenue departments to withhold census and tax returns. They cannot be published. In the absence of such obligations it would be unfortunate if departments thought that they could or should hunker down behind the ramparts of the "reasons" sections, and that they should not envisage releasing, in their discretion, material which is protected by those provisions. That could result in some areas in a regime less liberal in practice than at present. On the other hand, it is pleasing to see within the state services the attitude that this should not happen.

Having mentioned some of the characteristics of the protective provisions I should mention two areas in which major questions, difficulties, and interesting developments are likely to arise. These are the areas of *effective government,* and *commercial information.*

The processes of government are to be opened up. There is to be wider debate of important issues. More information is to be made available. And yet on the other hand, as the Danks committee put it:

> *"To run the country effectively the government of the day needs . . . to be able to take advice and to deliberate on it, in private, and without fear of premature disclosure. If the attempt to open processes of government inhibits the offering of blunt advice or effective consultation and arguments, the net result will be that the quality of decisions will suffer, as will the quality of the record. The processes of government could become less open and perhaps more arbitrary."*[4]

As you will know from your own professional dealings, many things are better done privately and confidentially. And this is not just a matter of the general processes of government. The Westminster system of cabinet and ministerial government carries with it the important features of collective and individual ministerial responsibility. How do you

reconcile those principles and conventions with the new principle that information ought to be made available unless there are good reasons to the contrary? How do you reconcile the principle of a neutral public service with the need for greater openness?

No legislation that I am aware of has failed to provide some protection to the internal processes of government. The United States Act, for example, exempts from its operation "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency". The United States courts have interpreted those provisions as protecting especially the advisory, recommendatory and deliberative processes of government agencies. The United States Supreme Court has said that the frank discussion of legal or policy matters might be inhibited if discussion were made public. Decisions and policies would be the poorer as a result. I might note that this does seem to indicate a greater sensitivity to the argument about candour of internal government processes than has sometimes been found in Commonwealth courts. This interpretation, however, does not close off all these processes. For example, under the United States system facts or internal law would not be protected. But should internal advisory and deliberative processes always be protected?

The New Zealand answer is not that they are always protected. Some of those internal processes might be opened up a little bit. This happened, for example, in the preparation of the legislation itself, in the work of the Danks committee. There you had a number of senior advisers to government twice reporting publicly, the second time with the inclusion of a draft Bill. There you had the possibility of public disagreement between those officials and their ministers, whom the officials would later have to advise in the regular, confidential way. Not only that, there was further room for disagreement later when the Bill would be referred to a select committee, because at that stage departments would make submissions and disagreement among officials would become clear. As it turned out, there was a public display of disagreement among departments and permanent heads about what the Danks committee had done, and about what the government was proposing to do. Royal commissions have provided other examples of officials publicly taking positions on matters of considerable moment, and thereby possibly creating strain in their relationships with one another and with their ministers.

The relevant provisions are section 9 (2) (f) and (g): information can be withheld if the withholding of the information is necessary to —

"(f) maintain the constitutional conventions for the time being which protect . . .

(ii) Collective and individual ministerial responsibility;

(iii) The political neutrality of officials;

(iv) The confidentiality of advice tendered by Ministers of the Crown and officials; or

(g) Maintain the effective conduct of public affairs through —

(i) The free and frank expression of opinions by or between or to Ministers of the Crown or officers or employees of any Department or organisation in the course of their duty . . . ."

Several features of these provisions — an unusual attempt to codify conventions — are important. First, it will be recalled that they appear in a section which makes it possible for the particular protective reason to be outweighed by other considerations rendering it desirable in the public interest to make the information available. That is to say, they are not conclusive. Secondly, they do not extend to factual material or to internal law. Thirdly, the provisions are themselves relative. Note the use of the phrase "for the time being" in paragraph (f). It contemplates that the conventions will continue to develop. Fourthly, the protection provided by paragraph (g) requires that in the specific case an argument be made that effective conduct of public affairs will in fact be prejudiced by the disclosure of opinions. Finally, the legislation does not give any special protection to cabinet or cabinet committee papers and deliberations. They will of course very often be protected but it will have to be by reference either to the substantive interests which could be damaged by release of the information, or by reference to the process considerations covered in paras (f) and (g). It is interesting to wonder why it was that at the very time when this legislation was being prepared the government was concerned to protect cabinet papers as such in the national development litigation.

This area is going to be one of continuing tension and development. Consider just two instances taken from the transport area. Some years ago Air New Zealand and the National Airways Corporation were merged. For a long time the government resisted the release of the relevant documentation on the grounds that the commercial interests of Air New Zealand might be damaged. There was also some reference to internal processes of government. In fact the relevant documents have been recently released, and they showed disagreement — that some people had speculated might well have existed — in the advice given to government. However, studies relating to long-distance passenger trains have not been released, presumably in the belief that disclosure would hinder the free and frank expression of opinions. (There may be a commercial argument as well.) But is it not the case that if the relevant facts, including costings, were made available, the various options could be presented, and arguments supporting one option as against another in this current debate could be set out? Public servants are now somewhat more public than they used to be: the Act recognises that one of its purposes is to promote the accountability not just of ministers of the Crown but also of officials. But timing is crucial. It may be that sometimes it is possible to release information after the event as a means of ensuring accountability, but if it is not done before the event how can it promote participation?

These two cases bear upon the other area of concern — commercial information. Particularly in the Air New Zealand / NAC instance, there was an argument that the information would be of commercial value to Air New Zealand's international competitors. So is it the case that commercial information provided in confidence must always be protected? The Danks committee did not think so. It said, for example, that not all government business activity has the profit-seeking, competitive colour of private enterprise. It continued:

> *"where national matters of economic or social moment such as the pursuit of regional development or of fuller employment become objectives, taxpayers who are called upon to subsidise such quasi-commercial activities should be informed about strategies and costs. Where commercial, social, and economic objectives become conjoined, as in the case of the Railways, it is impossible to find a comprehensive rule which will apply, and again judgments on the merits of each case will be called for".*[5]

Elsewhere in its general report the committee also indicated certain variables. The information itself could be of a varied kind: facts of a physical kind, trade secrets, possible options, information preparatory to decisions or negotiations. It could come from a variety of sources — within the public service, from outside, under compulsion, under an understanding of confidentiality, or voluntarily. It could be provided by bodies which are seeking some government concession or support or with no expectation of return. The information could be of a more general nature, thereby preventing the isolation of information relating to a particular business. The matter could involve significant political or social elements. By contrast the activity might be closely analogous to regular competitive private business. A final factor was that of timing. It could be possible to release information after negotiations are completed, whereas its disclosure in the course of negotiation could substantially prejudice the position of the agency involved.

These matters again suggest that it is difficult to state a single satisfactory rule in respect of commercial information and other similar information received in confidence. There has to be an approach which allows the weighing of relevant matters in each specific context. This was one of the major areas of controversy and difficulty in the preparation of the Act. The Bill as introduced included in the list of bodies which were to be subject to the Act a wide range of public bodies which had commercial activities. Many of them argued that they should be completely excluded from the scope of the statute. They were not really governmental, they were commercial, and they were competitive in the same way as other private commercial concerns. In the end that argument failed in its absolute sense with only one exception (the Bank of New Zealand). But the provisions in the Act relating to commercial activity were strengthened. Section 8, a conclusive statement of reasons relating to commercially competitive activities, was added. And section 6(c) was spelled out. It is, however, still important to notice the limits of these provisions. For instance, section 6(c) is essentially concerned only with the timing of the release. That is to say it will provide a basis for refusing the premature release of information concerning a possible substantial devaluation of the New Zealand dollar; it will not prevent the release of information after the event which might be used to call the government to account. And the new provisions in section 8 apply only to those cases where the government is in a direct competitive position. They are also limited in their scope by the use, in two of the relevant paragraphs, of the adverb "significantly" in relation to the damage to be prevented, and by a public interest element in the third.

It is very much in the context of the two protected interests which have been reviewed here that the future of this legislation will be tested. Just how far will it be possible to open up, in the interests of the purposes proclaimed in section 4, aspects of government decision-making which bear on important economic, commercial, environmental and related questions?

Processes for Decision

One of the main areas of dispute in the freedom of information debate is summed up in the question: who should decide? If that question suggests that all we are concerned with are disputes about access to particular documents or pieces of information, that question is not quite the right one. There are at least three aspects to an answer. First, and in a practical sense the most important, are changes within the administration. These changes must in substantial part be attitudinal. The administration must introduce a basic change in its way of thinking. Information is now to be made available unless there is good reason to the contrary. Moreover, as suggested earlier, it has to be accepted that the various protective criteria are not barricades to be resolutely defended at all costs.

The legislation makes it clear that the requester has some obligations. He or she must state the request with due particularity, and is not allowed to come along and engage in a general fishing expedition. But that requirement is complemented by the obligation placed on the administration to help those who are making requests. In this it will be important that decisions to release should be made at the lowest possible level, principally because the person who makes the release decision should be the one who regularly deals with that particular area of administration. But if access is going to be refused there is a good argument for that decision to be taken at a more senior level. And, of course, it must be justified: it is not enough simply to say "you are not going to have it". It is not enough simply to say that the minister has said "no". Reasons must be given in terms of the legislation. However, those administering the legislation will need to bear in mind — in the meantime at least — that there remain on the statute books about 100 pieces of legislation prohibiting the release of certain information. The Chief Ombudsman has been critical of the fact that they remain in force, and the Information Authority will review them as one of its major priority tasks.

Another point about the request process is that the Act is about information, rather than about documents. It is possible, therefore, to ask for information — as distinct from particular papers — and that may often be the more desirable thing to do.

The second main issue about decision processes — the one that has caused most public controversy — is about how disputes over access should be resolved. Should the decisions be made by the courts? Should they be made by a special tribunal? Should they be made, as was the case in Nova Scotia for a while, by Parliament? Should they be made by the ombudsmen? Should they be made by departments, by ministers?

The legislation provides that the ombudsmen have the principal role in respect of disputes. It should be noted however that the courts, although not having that central role, do have an extensive one. In the first place it will be for them to determine whether or not a right of access exists in one of the three areas identified earlier, or under the new regulations. Next, the courts will be involved in any prosecution for breaches of the prohibitive provisions in the related sections of the Crimes Act and the Summary Offences Act. And finally, they can review any exercises of discretion in the area which is essentially subject to the ombudsmen's authority. The criteria set out in the Act are not pious aspirations. They are rules of law. If ministers' decisions are not based on them they can be upset.

The ombudsmen's role is enhanced in three ways. First, they have jurisdiction over ministers. Under their general jurisdiction ministers are exempt although recommendations put to them can be reviewed. Secondly, while an ombudsman's decision remains essentially recommendatory, it becomes binding at the end of three weeks unless the minister, for reasons which he must publicly justify, vetoes the recommendation. Thirdly, the ombudsmen have jurisdiction over a wider range of bodies than normally.

Many arguments have been made in New Zealand and elsewhere on the choice of the complaints mechanism. Does the New Zealand Act, by allowing the minister the final say, provide for an appeal "from Caesar to Caesar" — that is, no appeal at all? Does not principle require that there be a power of final decision outside the executive government? At this stage in that lengthy debate I would like to make just three points. The first is that the ombudsmen already have very extensive relevant experience. But, it might be said, do not the courts also have a growing experience in deciding disputes about access to information, especially in the context of claims to public interest immunity? That is so, but the experience relates to access to relatively precise pieces of information for a precise purpose which the courts can assess. Moreover, the courts do not always show themselves that willing to require discovery even for that limited purpose. The second point relates to that and concerns the nature of the judgement that has to be made under the New Zealand legislation, especially the balancing required by section 9 (a special feature, it will be recalled, of the New Zealand legislation). The character of those provisions require judgement about consequence, about the balance of competing interests. In my view at least, they are better made by the ombudsmen rather than the courts. To put the point another way, there is an important link between the way the protective criteria are stated, and the complaints mechanism. Other legislation reflects this connection in interesting ways. The Canadian Act exempts information, the release of which could reasonably be expected to injure federal-provincial negotiations, the conduct of international affairs, law enforcement, and various financial interests of the government of Canada. The Federal Court's power of review is exercisable in those cases only if the head of the institution did not have reasonable grounds to withhold, that is to say, the court cannot make up its own mind on the merits. My third point is a political one, parallel to the last, which can be seen as an

institutional or functional one. It is this: governments may be more willing to allow potentially wider access (as may arise from a number of the characteristics of the protective provisions) if they have a greater hand in the process of dispute resolution. I should add that I do not know whether this was a consideration in the New Zealand case.

The Information Authority, the third part of the machinery set up for decisions, is again innovatory. It is an integral part of the progressive or dynamic character of the legislation. Its principal functions relate to the opening up of new categories of information to which access is to be given as a matter of right. In a sense the ombudsmen also have that function under the Act, but while their concern is with particular pieces of information, the Authority's is with general categories. As I have already mentioned, the Authority is to review existing legislation which protects official information. This will be a priority task. It also has a general monitoring function in respect of the operation of the legislation, and it has, as well, functions in respect of personal information.

In carrying out its tasks the Authority is to follow a procedure based on that used by the Securities Commission: to give people notice of what it has in mind, to receive comment, to generate discussion on possible areas that might be opened up. The reports of the Danks committee suggest various ways in which the Authority might select and define categories. The emphasis will be on assessing, by reference to the general principles of the legislation, the particular interests in specific areas of administration as they are seen from time to time. It would be necessary for the Authority to look, for example, at particular categories of commercial documents and to try to assess what the competing interests are, in terms of making some of that information available. The Authority then, like the ombudsmen and the departments, is part of a process with a purpose.

References

1. L. J. Curtis, "Freedom of Information in Australia", a paper delivered to a seminar on access to government information, A.N.U., Canberra, May, 1983.
2. For the membership of the Danks committee, see Introduction.
3. Committee on Official Information, **Towards Open Government, General Report,** Wellington, Government Printer, 1981, para. 21.
4. **Towards Open Government, General Report, op. cit.,** para. 47.
5. **Towards Open Government, General Report, op. cit.,** para. 46.

Discussion

Robin Williams (former Chairman, State Services Commission)

Professor Keith alluded to the release of notes of an interview with a job applicant. I think this point raises some interesting questions, and casts into doubt the future of the confidential reference. I would have thought a proper reply could be that case notes cannot be released as they will be incomplete unless confidential information is also disclosed. Is this reasonable?

Ken Keith

That particular newspaper report talks about the note made immediately following the interview, and I suppose that is somewhat different from the evaluative material referred to in the Act, and which would include confidential references. In one of its sections the Act says that information can be withheld

if, being evaluative material, its disclosure would breach an express or implied promise made to the person supplying the information, to the effect that the information would be held in confidence. But the interview notes are not themselves evaluative material provided in confidence. So it must be possible to draw some kind of line and still provide a sensible statement of reasons without necessarily going into the detailed reasoning of the person who gives the reference. But it is worth asking what happens in the case of an appeal to the Public Service Appeal Board where the decision that is under appeal is to be justified in part by reference to confidential reports of one sort or another?

Brian Colegate (Lands and Survey Department)

You referred to the right of access to personal information. Yesterday afternoon I had a 'phone call from a lady who asked me what the government's policy was on giving references when a person leaves the public service. I felt inclined to refer her to the State Services Commission. This would probably have been contrary to the spirit of the Act, anyway — but I had to be somewhat apologetic and say that as far as I could recall the rules said that nothing more than a certificate could be issued. The person was obviously very dissatisfied. So it seems that there is probably a dire need to see if the existing rules are written up within the spirit of the Act.

Ken Keith

As I recollect it the standard document is one that simply says this person was employed from date X to date Y doing such and such, full stop. But on the person's personal file there would be other information relevant to future employment: some evaluations, like six-monthly reports or whatever. In terms of the Act there is at least some right of access to that information. And it may be, given that such material exists, that there is now more scope for preparing references.

Henry Lang (Chairman, Institute of Policy Studies, Victoria University of Wellington)

I wonder whether the fact that interview notes can now become public will encourage people not to put things on record?

Ken Keith

I think that is a very real concern. On the morning of the introduction of this Act I heard the general manager of a producer board, who and which shall remain nameless, saying "we won't write things down any more". It goes back to that quote from the first Danks committee report that I read, about government processes becoming less open and more arbitrary. On the other hand, though, people are going to want to be able to justify their actions. That will still be a good reason for continuing to write things down. And it is also the case that large administrative bodies live on their files. There does need to be a record which people later can inherit and make sense of if you are to have a rational process of decision-making. But there is some tension and nervousness about how much access might be granted to notes of a less formal, pre-deliberative type, and so on. And that is why the process needs to be carefully worked out. Perhaps the comparison is not particularly relevant, but the same concern was expressed 20-odd years ago when the office of the ombudsman was set up. It was said that because the ombudsman would have access to files officials would not write things down fully, or there would be changes made to the files. I don't think those fears have been realised in the event.

Mervyn Probine (Chairman, State Services Commission)

You are very familiar with the original Bill that the Danks committee drafted, and you are also familiar with the way it finally emerged from the Parliamentary select committee. I would like you to comment on the differences, particularly one that I think is a bit strange — that is, a body corporate is now a person, although not a natural person.

Ken Keith

That particular change means that a body corporate can now ask for information under the personal information provisions. I will come back to that in a moment. I thought, however, that most of the other changes were not for the better. Let me mention two or three. But first, one change which was for the better was the change in the criminal provisions, which I have not mentioned at all. I think they were improved by the row that broke out about the release of information that would damage New Zealand's international relations. I was away at that time and it was really quite extraordinary to read *The Observer*, and to find that as a member of the Danks committee I had been responsible for drafting a New Zealand equivalent of South Africa's Suppression of Communism Act. But that particular provision was improved in the legislative process as a result of that row.

There are two or three other things which I think are pretty miserable. The limitation of rights of request to categories of New Zealand citizens in certain areas looks a bit mean. Another change was the introduction of the provisions in section 8 about commercial information. There were calls from many organisations covered by the Act to be excluded from it, but they stayed in, of course, except for the Bank of New Zealand. I have the impression that part of the price for keeping the producer boards and so on in was the widening of the provisions about commercial and economic information. This raises substantial questions about the way the Act is going to operate, especially in respect of the complex issues that arise in the broad area of economic-commercial-environmental policy. In that area the statute, as it finally emerged, became a bit more restrictive.

Now, coming back to the question of bodies corporate, I was surprised by that. We generally think about individual, natural persons when talking about the rights of people to have access to their personal information. We don't think of companies as being comparable, just as we don't generally think of companies as having privacy rights. A price of using the corporate structure is that some of the advantages that can be retained by continuing to be a person are lost. I don't think there is any precedent for this provision, and I wasn't aware that anyone called for it in submissions. I suspect there was a feeling towards the end of the select committee exercise that because members had spent so much time and effort on this legislation they all wanted to leave their mark.

Official Information and the News Media

Brian Priestley

Discussing the Official Information Act at the moment — only weeks after its inception — is rather like trying to write the official history of the battle of the Somme. The whistles are blowing, and the first troops are going over the top. The reports are trickling back: we're gaining a few yards here, being beaten back a little there; and while the smoke and dust of war clouds the battlefield, above it all the ombudsmen sit silent and inscrutable. However, in talking about the news media in this context, and speaking as a journalist, I would like you to remember that we are not the enemy. In the United States only 27 percent of requests for government information comes from the media; a few more inquiries come from service and local amenity clubs; but by far the majority come from industry. And that is what is going to happen here in New Zealand when people wake up to the fact that government information means money. When this happens you will receive more and more requests from industry backed up by lawyers trained to specialise in official information legislation, and backed up further by the sales manager's second cousin, who happens to be a backbencher in Parliament. And — not the least of all — backed up by all the resources of New Zealand's old boy networks.

I do feel that one thing this conference does miss is a lecture on the old boy network in the dissemination of confidential information in New Zealand. We the journalists are not necessarily on opposite sides from you, the officials. In fact you may come to regard us as allies at times. I had always thought of public officials as being "them" rather than "us", until I did an inquiry in Birmingham. It began when somebody pointed out to me that 27 members of the Birmingham City Council were real estate agents. So I started to wonder why it was that land agents were the most socially responsible citizens. We began noticing things, like presents being given to committee chairmen, and we were curious to know why it was that one firm got nine contracts from one committee, although in no case did it put in the lowest tender. We went on like this and ended up with two articles on the centre page of *The Times*. At the end of it all, trickling down from the highest echelon of local government administration in Birmingham — although, of course, the person never told me directly, and would have denied it — came two words: "thank you".

Brian Priestley is Reader in Journalism at the University of Canterbury.

At that point I became aware that the news media and public servants are often in the same camp, because on the whole we often want the same thing. It doesn't matter to us who is going to get elected at the next election; what we really hope to see is a well run government.

So who are the media in New Zealand? To start with, there are more than thirty daily newspapers, which is remarkable for a country of only three million people. There are massive variations among these papers — from the *Ashburton Guardian* with a daily circulation of about 6,000, to the *New Zealand Herald* with a daily circulation of more than 200,000. There are also the weekly papers — and you will be hearing from them often under the Official Information Act. They include, of course, the *N.Z. Truth,* the *New Zealand Times,* and the *Sunday News.* There are the community papers, perhaps 100 of them. There are something like 400 magazines, news sheets and so on, ranging from the *Listener,* with a circulation of about 350,000; the *New Zealand Woman's Weekly,* about a quarter of a million; and right down to *The Clifton Hill Residents' Newsletter,* with a circulation of about 200. My guess is that you will be hearing from the likes of them a good deal, too, once local residents and amenity societies begin to realise that you are available and have something to offer them.

What would you expect from the southern-most paper in the English-speaking world, tucked away miles from anywhere in a place called Invercargill? Yet the *Southland Times* is a very good paper indeed. Throughout New Zealand there are one or two "stinkers" no doubt, but overall the quality of newspapers is remarkably good.

They have the problem of small staff numbers. In Birmingham we would put out *The Birmingham Evening Mail* with the help of about 140 journalists. *The Star,* in Christchurch, has about 60 journalists, I believe. But papers like the *Ashburton Guardian,* and *The Greymouth Evening Star* have only a handful of journalists. Therefore they don't have specialists, and their coverage can be immensely superficial. They rely on the Press Association a great deal, and their own reporters will often be lacking experience. For example, as you may know, at the University of Canterbury we have a graduate course in journalism. A few years ago I was speaking to the editor of one of our leading metropolitan papers and was asking how our ex-students had been shaping up on his paper. He said he was not sure about one of them who had joined the paper three weeks before, after completing our course. I asked him, "Why not?" "Well", he said, "he made an awful mess of covering the murder". So here was a recruit being asked to handle a murder investigation with only three weeks' experience in practical journalism.

So editors are constantly sending youngsters out, partly because they have to, on jobs that they shouldn't be tackling. You will sometimes encounter some of these inexperienced reporters. You will find that their training is very variable. *The Evening Post,* for example, holds seminars on the Official Information Act. It has a training officer, it has office meetings on its approach to this Act, and what it ought to be doing about it. They know a great deal about the Act at the *Post*; but I doubt whether that is so of most of the smaller provincial papers. Probably, the further away from Wellington and Auckland you go the more a paper's

knowledge of the Act decreases. On the smaller community papers I doubt whether they are really sure that it exists; or if it exists, what it says. But on the whole New Zealand journalists are quite well trained. They are also generally well-meaning. They join the staff often out of some vague feeling that they ought to do good in the community. The profession then spends some years trying to knock that notion out of them. Nevertheless, I think there is a residue of it in all of us.

On the whole journalists are a reasonable bunch of people to deal with; but they are not much accustomed to thinking about things like ethics. There was a television series on earlier this year dealing with ethical issues and the professions. In one programme questions were asked of editors. One question was about how much of a politician's private life ought to be made public. The editors of two of New Zealand's more popular papers were totally unable to distinguish between what is *in the public interest* and what *interests the public*. And a former editor of one of our largest newspapers claimed there were unfortunately no guidelines to deal with cases like this. Well, there are very many guidelines to deal with such matters, including a British Press Council statement that is probably the last word on this sort of thing. It just happened that nobody on this television programme had ever read it. So newspapers are not particularly good at the type of argument that is possibly going to arise as a result of the introduction of the Official Information Act. But they will be a good deal better at it by the time they have finished.

The newspapers are the great news-finders in New Zealand, and on the whole when we are talking about the use of difficult information we are talking about the role of newspapers. Radio is much involved in commercial competition, so its managers listen a good deal to surveys which indicate, for example, that to attract the marginal listener you need a news bulletin which is brief, cheerful, and local. Radio, therefore, is gradually progressing in the direction of breezy local news bulletins with no item exceeding, say, 17 words. Stations are gradually laying off staff and becoming much more superficial in their news coverage. So I think you are unlikely to meet many radio journalists as a result of this Act, although you may meet some of those working in the current affairs field.

You can expect, however, to meet television journalists. My guess is that the current affairs programme, *Close Up*, will be extremely interested in this Act. This is a programme of some stature, well worth taking seriously. But just how much you will be seeing of television news I do not really know. Their ratings have been slipping massively in the last few months. They have been accused of superficiality, and they certainly have a lack of journalists with expert knowledge of specialist fields. And their training is very variable. There is a heavy reliance in television, as there is in radio, on newspapers to do the hard work of actually attending meetings and digging out stories. Only then will television and radio follow them up. But a new head of news has been appointed, and they are keen to do something to boost their performance. Just what they are going to do we shall have to wait and see.

It seems to me, then, that as President Franklin Roosevelt once said, all you really have to fear is fear itself. The news media I have been

talking about are not monsters, and they are not generally irresponsible — although they are certainly human.

I remember two British cities that went about implementing a city centre redevelopment programme. One, Coventry, decided to replan the traffic layout in the central city area. They made it a city-wide project, and organised ward meetings to which people were encouraged to bring their ideas and problems for discussion with the local councillors. There were essay competitions for various age-groups, in which people were invited to set out their ideas about the Coventry of the future. They also had a children's painting competition. Nothing could have been more open: every possible attempt was made to attract the ideas of the people of Coventry. Thousands of ideas flowed in as a result. The other city, Lincoln, decided to keep quiet about plans for its city centre. The Lincoln city authorities preferred to get the developers in, get a plan drawn up, and rush it through. However, somebody leaked the plans to the local civic society. As a result several years later Lincoln still hadn't got its city centre scheme even halfway through the planning process. Coventry, on the other hand, was proceeding happily because — as the person in charge of it told me — the thousands of public ideas received cancelled themselves out, allowing the council to go ahead and do what it had originally planned.

I also remember the great fuss kicked up in both Nottingham and Leicester, when the two county councils decided that all business should be thrown open to the news media. There were to be no more secrets, except very personal ones. I wrote a piece on the Friday saying that Monday was going to be D-Day, and that staff were battening down the hatches believing a media invasion to be imminent. But Monday morning came and not a thing happened. And for the rest of the week not a thing happened. They discovered that, in fact, by opening everything up they had massively decreased the number of inquiries made by the media. Since there were no secrets there was no fun. If I may say so that is another part of the news media's character.

You could find things becoming difficult if you get mixed up in what is now becoming known as investigative reporting. I was asked to say something about this. Certainly, in many ways it is up-and-coming. It began in America where it was spawned by local corruption and graft; it has gradually spread to Britain, and we now see it occasionally in New Zealand although there are few papers here that have the resources to do it. But even those people who do not actually do any investigative reporting — about 98 percent of the journalistic community — nevertheless feel they ought to. Every time a programme like *All the President's Men* appears on television the number of people applying for journalism courses in New Zealand shoots up, temporarily.

The key to it all is that, given our defamation laws, what we need is facts, because if you are going to do reporting that is in any way liable to court action then the key question that must be answered about every fact included in the report is, "can I prove it in court?". Not, "is it true?". Not, "what did he or she tell me?". This is where officialdom comes in, especially those of you who are looking after documents, because docu-

ments, reports and so on are meat and drink to the investigative reporter. These are the things that can be produced and waved around in a court-room. They are tangible.

I want to give two examples of investigative reporting in New Zealand. The first is the Marginal Lands Board affair of three years ago. News media investigation into these events was carried out almost entirely by newspapers. It was based very firmly on documents. There was no attempt whatever to inject comment. It was beautifully done, factual; extremely well researched. It was probably one of the most heart-warming things from a professional point of view to have been done in New Zealand over the last few years. On the other hand, however, we had the Birch episode of 1981. This stemmed from an item on television's *Eye Witness News* suggesting that something very dodgy had been happening concerning a bit of land owned by a company whose principals included cabinet minister, Mr Bill Birch. At issue was the granting of a prospecting licence. Mr Birch's company owned the land, and this other company had a prospecting licence on it. The implication was that Mr Birch's ministry had improperly granted the licence. This story was all very well, except that television staff never actually asked the person in the ministry who gave the permission whether or not Mr Birch knew of it. Nor did they speak to the secretary, the chairman, or any of the shareholders in Mr Birch's company. And they never spoke to the prospecting company. They based their story only on documents. (*Mr Birch successfully sued the Broadcasting Corporation of N.Z. for defamation damages. — Ed.*)

I thought I would now briefly talk about you, rather than about us, since I don't see why I shouldn't tease you a bit. I have had quite a bit to do with official information since I was involved with the Justice Department booklet on the subject a year or two ago. I would here prefer to set aside for the time being the broad points of principle and focus on some simple matters of detail. For instance, I remember going around the Land and Deeds office of the Justice Department in Christchurch a couple of years ago looking at a vast repository of information about land. There were many people coming in from solicitors' offices to look things up amidst this vast collection of files and rolls of parchment. Records of every piece of land and everything that has ever happened to a piece of land in Canterbury are there in that room. But one had to go to the information; none of it was available by post. It was explained to me that if it were available through the mail everyone would want it. Amazing. Fortunately, under the Act I can now ask that you send me a copy of any such document.

I also remember talking to two Christchurch court registrars. I asked each whether if he had a circular from head office giving certain advice on the way in which a court should conduct itself, would he release this information to the media? One said without doubt that he would. The other said without doubt that he would not. This contradictory response reflected a problem faced by registrars which is very simple but capable of causing massive confusion. There are certain lists of things that you are fully entitled to see if you go into any district court. On the other hand, there are also lists that you are not entitled to see if you go into a district court, because these are, for example, private and personal. But you may

not be allowed to see some of the information you are entitled to see in some of the district courts because it is written on the same page in the register as things you are not permitted to see. It had not occurred to anybody that it might be a good idea to have one register for information that is confidential, and one for material that is not. It seems to me that if we can correct some of these organisational shortcomings we shall make considerable progress.

To finish with may I tell you something about a survey we in the journalism school carried out recently. We thought we would have a bit of fun and see how things were going with the Official Information Act, so we wrote seven letters to various corners of the bureaucracy. Each letter was signed by a journalism student. (Since we thought that each agency might contain at least one person who had seen me on the television programme, *Fourth Estate,* we felt that my signature might not have the right effect.) We wrote one to the commercial affairs office of the Justice Department in Auckland, asking for the latest annual return of Wilson and Horton Ltd. That arrived, but it took them eight days after receiving our letter to post it off. It does seem to me that an efficient office could have got it off rather more quickly. We wrote to the Department of Education in Christchurch, seeking to find out how much money the Minister of Education received by way of salary and expenses. It passed the letter on to its office in Wellington, which sent it on to Internal Affairs, which answered in eight days flat. Since that item of information is published when the minister is appointed, and is constantly updated by the newspapers, I think they might have done a little bit better. But never mind. We wrote a letter asking about a couple of obscure tribunals, and received the information back very pleasantly from the Justice Department — with speed and accuracy. We wrote a letter asking for the number of company bankruptcies in New Zealand in April this year, compared with April last year. There was a fair delay on that one, before we received the facts in a letter signed by the minister. This was rather remarkable. It was an ordinary piece of information. Are ministers really going to get involved in everything that could possibly have political implications? We wrote a letter to the Minister of Labour asking the cost of his visit abroad, and how many officials he took with him. This was intended to read as a hostile letter, but we felt that the disclosure of information should not depend on the recipient's judgement about the writer's purposes. Again, the minister himself replied, but he did not answer the question. We wrote to the Railways in Christchurch, asking how many people they employed in Canterbury. We were getting worried about the amount of time everyone was taking to reply to our letters so we thought we would ask for something that should be readily available. The Railways wrote back advising us to write to Wellington. They should have forwarded the letter on themselves. When I last heard, a fortnight later, we still had not found out how many people the Railways employed in Canterbury.

The absolute gem of the whole exercise came when, upon reading *The New Zealand Gazette,* we noticed the announcement of a Mr J. E. Askwith's appointment to the Poultry Board for a period of three years. With that, we wrote to the Ministry of Agriculture and Fisheries: "Will

you please tell me if Mr J. E. Askwith is a member of the Poultry Board, and how long is he there for?". Three days later the student who had signed the letter rang me up and said his sister had told him there had been a man around their house asking questions. Apparently the man was "very shabby and looked like a detective". He walked up and said, "I am from the Poultry Board. You know, chooks. Is it true that there is somebody in this house who has been writing letters asking about Mr Askwith's appointment? Who is he and what does he want?" Finally, after having been assured that the letter-writer was a journalism student at the University of Canterbury the man drove away in a car — of a very significant colour and make, according to students who have been following the activities of the Security Intelligence Service in Christchurch. But that no doubt was a coincidence. We heard no more, but wrote again 10 days later to the Ministry. We had had no reply to our first letter but this time they did write back to confirm that Mr Askwith was indeed a member of the Poultry Board. With that triumph of democracy I now conclude.

Discussion

Cheryl Campbell (National Archives)

May I suggest that the reply time you mentioned — eight days — is a miracle, not something reprehensible. I was relieved to note when I first read the Act that people requesting information may say how they want it, though their preference may not be agreed to. For Land and Deeds, being besieged by genealogists and others, to provide photocopies when requested would be impossible. In many cases it would also be hazardous to documents and other material covered by the Archives Act. For a long time we have worked on the principle that if it takes longer than a fairly brief search, or we are not sure where to go and can't reasonably find out, then we invite people to visit, even if they are living in Sydney, Invercargill, or Christchurch. We don't have the staff to do it any other way.

Brian Priestley

The week's reply time was not my figure. It was drawn up by the State Services Commission. I don't know about the National Archives, but I do think that all this company and land information is perfectly easy to copy. There have been times when some of the smaller provincial newspapers have had inquiries held up because they haven't been able to travel to obtain these things. And it's the smaller papers that really do need encouraging. I don't know about genealogists, I'm sorry.

Mannie Underwood (Valuation Department)

A week after the Official Information Act came into force I was telephoned by a reporter from *The Star*, who said that an irate lady had rung up. Some computer print-out information containing the names, addresses, land descriptions and values of properties in Christchurch City had been found in a kindergarten. It was dated 1981, and was a print-out of the revaluation information from the Christchurch City roll. It was well superseded, and the paper had been passed on by someone to this kindergarten so that children could draw pictures on it. The reporter wanted to know why we had allowed this information to be made public in this way; and what were we going to do about it? I inquired if he had ever heard of the Official Information Act, and told him that the data was public information, that it was open for public inspection at the time of revaluation, and that anybody could come to the office to get it. He thanked me very much. That night in *The Star* the basic information that I had given him was printed but it was under a caption like, "Irate resident dislikes computer output information being made public".

Brian Priestley

I think you did very well. But I am bound to say you now have this great advantage. Our top news stories — the pieces of official paper found on the rubbish tip; the governmental brief case left in a taxi — are all going down in flames, because it's now all part of the service under the Official Information Act.

John Robertson (Consultant)

I'm a bit bothered about the question of investigative journalism. It seems to me that if the regime of official information is to serve the public interest it must be capable of being discovered and interpreted to the public or special interest groups in a form that enables them to take some action, to debate an issue, or to express a view. Otherwise it doesn't serve democracy at all. I wonder whether as a country we are training enough journalists to do this work. If you look at New Zealand newspapers' criticisms of government and so on, and then compare that with what happens in Canberra, London or Washington, for example, you can see that ours are as tame as old goats. If a government in a single-chamber, no-constitution system like ours is to be held publicly accountable then not only must people who come to the counter and ask for information be able to use it and judge their government accordingly, but also journalists have a particular responsibility to find material, to use it objectively, and to make the public think about the processes of government. I am not at all confident that newspapers are putting enough resources into training journalists who can do that properly.

Brian Priestley

I would agree with most of that. As far as the initial training of journalists goes, which is what I am mostly concerned with, it is not too bad. In fact, our best are as good as you will find anywhere in the world. And if you are a graduate or you are fairly bright then you would be better trained here than you would be in Britain or Australia. The problems start after that. For instance, I don't think that the New Zealand Journalists Training Board is currently running any seminars on the Official Information Act. If I am wrong about that Warren Page will no doubt tell us. They tend to want to train people in straightforward journalistic skills like sub-editing or interviewing and so on. A major problem is the small size of most newspapers, which means that they don't have enough specialists who can really dig deep. Some of those who do have the size aren't really interested in digging deep. You could argue that one of the reasons for the success of *The Press*, for example, is not that it investigates but that it doesn't offend many people. I think that is important. And because we are a small country we have very few magazines of opinion and discussion — like *The Economist*, and *The Spectator* — so we don't have those sorts of debates going on in New Zealand. We have the *National Business Review*, which is of a very high standard, but when you have mentioned that paper you have almost said it all. The fact that we are a small country means that everybody seems to know everybody else. New Zealanders on the whole — and this goes for a great many editors — don't like criticising people. That's something almost inbuilt in them.

Richard Hoggart, the former Assistant Secretary of UNESCO, came here a few years ago. He said that in UNESCO they believed that to have a full cultural and intellectual life a country needed a population of at least five million. I think we do very well given our three million people scattered over a difficult country, geographically. But there are problems and deficiencies, and I think you have put your finger on one.

John Pohl (Ministry of Energy)

Would you be satisfied with a refusal to supply information, on the grounds that it was publicly available? And do you agree that your students were asking the departments to do their journalistic work for them?

Brian Priestley

No, on both counts. Journalistic work is often properly about getting hold of people who are supposed to know and asking them questions. It's not really on for a department to reply to a small paper by saying that the information is

available, say, on page 33 of *The New Zealand Gazette* for the third week of October, 1962, and good luck to you down in Greymouth.

Syd Holm (State Services Commission)

I should like to pursue John Robertson's argument a little further. You have been concentrating on the relationship between government and the news media. But the media's relationship with the public is probably of more significance in terms of the Official Information Act. John Robertson's point that investigative journalism needs to be developed must be stressed; but, also, when Joe Average asks for some information and is turned down, the best way he can further his argument is to go to the news media. Do you see it that way?

Brian Priestley

Yes. It is very important to the public; possibly less so in New Zealand than in, say, Britain where society can seem to be ruled by massive public bodies, which can seem terribly impersonal. So to some extent in bigger countries the news media takes the public's side as it were against huge bureaucracies. It isn't quite the same in New Zealand. There are times when the smaller papers and the public are almost the same thing, because the papers have such intimate links with local pressure groups and councillors. Going back to what John Robertson said, Mr Muldoon a week ago announced that New Zealand had an external debt of $13 billion, but according to him this wasn't too bad if you considered it by the standards of Brazil, Argentina or Mexico. It was quite remarkable that that statement should have been virtually ignored by the news media. But it is the sort of thing that newspapers in New Zealand have difficulty in coming to grips with.

Bing Lucas (Director-General, Lands and Survey Department)

I think we can over-state the lack of investigative journalism. There is some very good work done, as illustrated by coverage of the proposal to export fresh water from Deep Cove in Fiordland National Park to the Middle East. When the National Parks and Reserves Authority came to consider it, it had more background information from two newspapers than from the applicant. The *New Zealand Times* took the trouble to find out who was the principal of the company; it traced him to Oklahoma, telephoned him, and obtained a great deal of information from that source, and also from independent reports prepared elsewhere. Subsequently, *The Evening Post* obtained international reports on the whole marketing strategy for fresh water. On the other hand, television's *Close Up* item on this subject was very superficial, in my view.

Dave Smith (Ministry of Transport)

Earlier today, Brian Candler said that when the Australian Freedom of Information Act was introduced 685 ceiling positions were made available in their federal bureaucracy to serve the purposes of the Act. By my calculation that would be the equivalent of about 160 ceiling slots in New Zealand government for the same purpose. But I would hazard a guess that some of our government departments which keep losing staff are not gaining any to service this legislation. So an eight-day response time in certain government departments is quite magnificent, for the following reason: if you are asking for mundane information that was available before the Act came into force you might get it within three days, but a certain amount of bureaucracy comes to surround the implementation of a new system, so it takes probably ten times longer to do things in the first two or three months, when there are usually "teething problems", than it would once the new procedures are working smoothly.

Brian Priestley

Yes, but I am a bit worried about people like public relations officers being especially brought in to serve us information. What it often means is that somebody who knows nothing about a subject is talking to somebody else who knows nothing about it. As a journalist I personally would much sooner talk to the person who really knows about it rather than with some information professional brought in from outside.

Robin Williams (former Chairman, State Services Commission)

If we are going to have a situation where people are asking about a minister's salary and allowances — in other words, seeking information that is already publicly available — then I think I was deadly wrong in my estimate about the possible workload. But the Act actually says you can decline to supply information if it's already publicly available. That was deliberately suggested by the Danks committee which was aware that this could become a serious problem. I share entirely your view that if you want to get information you must in most cases talk to the person who's closely involved, and not with the public relations office. But let's be quite clear: that does involve a significant impediment to the normal operation of government. It also implies higher staffing levels.

Brian Priestley

But if you are, say, the Clifton Hill Residents' Association then it might not be easy to get hold of certain information, even when it is already publicly available. It may be much easier and quicker for them to write direct to government agencies for it. Are you not going to tell them?

John Robertson

I am still concerned about this question of investigative journalism. What you said only puts it in the "too hard" basket. But the whole purpose of the Official Information Act is surely to promote more open government, and if we haven't got journalists and others who are capable of putting the hard word on the governmental system — and believe me, it is going to have to be a very hard word — and who are able to force matters to a head, through the ombudsmen, the Information Authority and so on, then it will mean that special interest groups will still be the only people capable of looking after themselves, of protecting their own interests. John Citizen needs the news media to help him do it. So unless we take this question very seriously the whole objective of open government will be lost, and it will be senseless to proceed with it.

Brian Priestley

I think you are overdoing it a bit, but I generally agree with what you say about the lack of investigative reporting. Many of our newspapers have little idea of how to go about an investigative inquiry. But there are some who are trying: for example, the *Auckland Star*, the *N.Z. Truth*, the *New Zealand Times*, the *Sunday News* (in its way); also *The Dominion*, and *The Evening Post*; let's hope the *Listener*; certainly the *National Business Review*. It's a small list but it grows, and it will grow further if there is some encouragement. Journalists ought to be digging harder and looking deeper. However, it is very difficult if you work for a small paper which could be wiped out overnight by a defamation settlement the size of those that have recently struck *The Press* and the Broadcasting Corporation. Editors have to think very hard about possibilities like that.

Jack Hodder (*The Capital Letter*)

What do you hope will happen to the news media as a result of the Official Information Act?

Brian Priestley

My hopes focus on two levels, the local and the national. I think one of the great things about New Zealand society is its lively grass roots. There are so many local community papers, for example, often competing with one another. I hope that they will find information much easier to obtain, that it will be more relevant, and that local democracy will become even livelier. At the national level I hope that it will be easier for people to make inquiries of government, and find things out. I agree that journalists ought to be better trained, and that the press ought to be heroes and experts. But I have to face the fact that they aren't all. And I hope the news media won't constantly be facing hard defamation suits.

Official Information: A Maori Perspective

Kara Puketapu

I have been asked to offer some comments from a Maori, and Polynesian, point of view on the question of official information. Perhaps I can begin by saying that it is interesting that the Institute's brochure about this convention should mention the disclosure of information. The word "disclosure" suggests that government is hiding something. However, a fundamental concept of Polynesian cultures, and a number of other similar ones, is not disclosure but sharing. It is this simple attitude that for me provides the key to looking at this matter from a different perspective.

The sharing idea is still very strong in Maori and Samoan people, and probably among many of the other ethnic minorities in New Zealand. It is there in varying degrees in all of us, but bureaucratic culture makes it very difficult for officials to move close to what is happening in the wider community. So when the Maori Affairs Department a few years ago decided to change course it did so because it recognised how limited and hamstrung it would be unless it were prepared to go out amongst Maori communities and demonstrate that it was really a part of their culture rather than a product of the traditional public service ethos.

Many people now look at the Maori situation and argue that our department can do that sort of thing with Maori communities, but that it cannot be done with, say, taxpayers by Inland Revenue, and so on. But I am not sure that they are right. What this Act means, partly at least, is that government officials are now going to feel that they are working in another culture. This Act means that we officials must change our thinking about ourselves. In a sense we are all having to become less "westernised" if you like, and more in sympathy with the Maori and Polynesian way of conducting community affairs. People generally will be much more inclined to say that, "if you are going to work with me, Mr Bureaucracy, then let's work together, sharing and trusting and respecting one another on common ground". We know that we can sit in our little offices and avoid a 'phone call, say we're out and all that, and that might not matter much anyway — you may simply be avoiding an individual.

At the time of the convention Kara Puketapu was Secretary for Maori Affairs, a post he had held for six years. He has since become Managing Director of Maori International Inc.

But in community terms, what the Maori Affairs Department has done has been in effect to move our house out to where the Maori people live and gather together, generally a marae of some sort or another — be it a factory, a traditional marae, church or whatever. From the ministerial level in the department, right through to the district managerial level, people have been taking their staff out to sit down with Maori people — leaders, radicals, old women and young men, everyone. When we find that as officials we are not really at liberty to tell people certain things at that particular time, then we have to ensure that we can continue our dialogue on the basis of trust. If we explain the constraints that are working on us, by and large the people understand our position. But we must be equally sure that we understand their's.

When we first started this process I am sure some of our senior officers were rather apprehensive about it all. Now they are much more relaxed; they realise that the Maori people regard them as respected leaders. And I say "leaders" deliberately, because, if each one of you, for example, represents a particular activity of government, be it housing, social welfare, health or whatever, the Maori people will be particularly inclined to see you as a leader because of their very strong tradition of accepting and putting their trust in authority figures. But it's a two-way process. If the leaders fail to go back to the community to discuss with them the issues and problems that the people are raising then there is trouble. That's where this mutuality, if you like, breaks down. Unfortunately, the public service has usually been inadequate in this respect. Indeed, standing here and talking at you like this is not the sort of thing that Maori people would encourage. Instead, I should be sitting around the room with you. This sounds simplistic, but it is a point of fundamental significance. The Maori way means, in effect, that information is being passed between people who can see one another's faces, and understand one another's feelings.

In the traditional public service — that is, bureaucratic — manner we have boxed ourselves in with memos and files, with words written impersonally on paper. We worry about being committed to what we write, and we seek legal advice on this and that. This has to be a part of the process, but sadly it has become too dominant a part. We spend a lot of time, a lot of money, and create a lot of inefficiency, because we have bogged ourselves down with it. I believe the Official Information Act will help us to unwind a bit, and enable us to become more creative and flexible public servants. I welcome that.

It will mean, of course, that there will be a new set of procedures to follow, so care will be needed to ensure that the purpose of this Act is not ultimately neglected. For the Act is about people, and people will not be receptive — they will not readily accept, for example, why some information may need to be withheld — if we just sit in our offices and issue edicts. Permanent heads, in particular, have got to think about how they can engage the community because that's where the leaders in the various areas of government policy are to be found. They do not exist only in departments, or in the political arena. We in Maori Affairs have found that the very regular engagements we have with Maori people develop not only better friendship and understanding but also enhance

trust in leadership. We have very close, warm, dialogue; it is very vibrant, and it is based on the minister and the department's officers fronting up in person and responding to the questions that are put to them. It has led to a continuously developing appreciation of the whole spectrum of Maori affairs. So in adopting a more relaxed attitude to the dissemination of official information I believe we should regard the Maori approach as a good model to follow.

I am delighted that the State Services Commission has begun to run marae-based courses for public service cadets. On the marae where the first two courses were held people have expressed a strong interest in the public service as a whole. For the first time the marae folk have been personally involved with people from various government departments in a training programme, and it has widened their perspective. They really feel honoured that these young public servants have come to talk with them. They know that it will benefit *society as a whole,* because these young cadets are going to be running our departments in the decades ahead. The Maori people on the marae feel this strongly because they dislike the individual who takes advantage of a situation for his or her personal gain, without benefitting society generally.

Finally, I would just say that this "fronting-up" process works both ways. From our experience we know that it gives us the chance to find out what is being done in the community. We need that information if we are to do our jobs effectively and efficiently. So we make sure our staff understand this cultural, or philosophical, commitment to the concept of sharing and openness. That is essential in ensuring that the legal and administrative procedures which are built upon this commitment continue to facilitate the process of mutual exchange between the department and Maori communities.

Discussion

Dallas Moore (Ministry of Works and Development)

Although the Act is about information many of the transactions that take place under it will involve documents. You spoke of administration becoming bogged down in paper and files, and contrasted this with the more informal, face-to-face methods adopted by the Maori Affairs Department. Do you find, however, that the paperwork still builds up, and if so how does the department deal with it?

Kara Puketapu

I would think, for example, that at the moment the Minister of Maori Affairs receives only 10 or 20 inquiries per week. And they are usually on rather low-key matters. I can't recall actually writing a "ministerial" myself for a long time. This is largely because the Maori people, as a result of the department's approach, have become much better informed about our activities, and that in itself is more efficient. There is less paper coming into the office, and less going out. The Maori emphasis is certainly on oral ability, and information is conveyed through exchange between departmental staff and Maori community leaders. The latter are much closer to us now; we bring them into our departmental meetings, and when we go into a community setting quite often it is not our staff who are doing all the talking and explaining. These leaders also talk, and they have become very informed about policies, the state of the political play, and so on. But in addition to that the communities are wanting documentation. They are acquiring a taste for paper also. So it is not an exclusively oral culture that

we are talking about. However, I would suggest that the amount of paper flowing through the department has in recent years been reduced substantially as a result of our face-to-face engagement with Maori communities.

Patrick Millen (Secretary of the Cabinet)

I think it is important to grasp the idea that the Act is about information rather than documents. The important point that you have brought out is that under the Act a new, and more informal, attitude is required. There will be many applicants who will take a formal approach. I even had one who concluded by writing, "I hereby make a confidential application for public information". I believe that with more informal exchanges documents only become relevant at the end of the line. Very often, to introduce discussion about documents tends to gum up the situation. It is not the document that is important but the information in it. We have become too used to doing things in a formal way. So what you were saying about the Maori way is very relevant to the public service generally. Before the introduction of the Act if you said "no" that was the end of it. Now you have to give reasons, and I think you have already illustrated how people can be brought to accept the answer "no" if they are given adequate reasons in a proper context. It must be less of a "them" versus "us" situation.

Kara Puketapu

I can't recall ever saying "no" to a Maori community, because I don't have to. We talk it through. The exciting thing about this is that you often end up with a new set of options, new ideas that have emerged from everyone's involvement. We would sometimes have an irate group or individual asking what the department or the government is doing about this or that. But then we start to talk about it, and it happens that there is always somebody there who can bring a balanced view to the situation. People unwind a little and get a more rational line on something. Once that is established we end up back in the office with something to work on. This is trust. The informality involved in gaining it, however, still requires a great deal of skill. I mean, you folk are easy. I know where you come from. But in a broader community you have people who went to school until they were 15, and others who went to school until they were 50. All sorts of experiences are involved; different levels of education, and so on. Not only that, but of course among Maori people themselves there are differing views and experiences. Some think there should be total integration; some think there should be assimilation; and some think there should not be anything at all. So people demand information for different reasons. But in a Maori situation the leaders will begin to work the traditional value systems into the discussion, and sooner or later everybody is brought around to a particular way of thinking. And then you can release information more quickly and more effectively as people understand it better. It is a slow process to begin with but we have found, after six years of doing it, that people are not interested in that old adversarial approach any more. They are now more interested in creating new programmes and new ideas than in finding out what is locked in the department's files. There is a degree of trust, which fosters a healthy relationship between the department and the people.

Warren Page (*The Evening Post*)

Would the trust and leadership that you speak of be as easy to find in the wider community as it is on the marae? Does the bureaucracy have to depend more on special interest groups? The oral and consensual tradition that you were speaking of is to be admired, but it does seem to run counter to the systematised adversarial style which is built into so much of what governments do.

Kara Puketapu

I don't think it runs counter to it. Where do you go, anyway, if you have an industrial dispute? You have got to sit down and talk. It's fundamental, isn't it? If you are suggesting that it is difficult to take that negotiation out into the wider community, then I think that is probably right. But the wider community certainly wants to have its say. Take the Kawerau industrial dispute, for example. It was turned around by this community process: a different cultural attitude was

brought into it from the Maori community in Kawerau. The wider community is full of very good leaders. And I am not necessarily talking about heads of organisations. I am talking about people whom others trust to speak for them. Some departments which have not taken on this approach could bring these people around them in in-house sessions, maybe 20 or 30 people at once and inquire about how the organisation could get closer to the community. Ian Johnstone's television programme was interesting when last year he set up discussions among community people. It was a bit more difficult because it was in front of cameras, but even then you could see people relax and start to come together. This is the sort of thing — not television — we are interested in in our department and I think the public service generally needs to take steps in this direction. You have to be prepared, however; you have to understand what your work is all about, what business you are in. You have to try to bring in as many key people as possible. You have to plan a strategy, right down to the simple things regarding where and when you should have the meeting, and how it should be structured. I can't answer all your questions, but I am trying to give you a feeling about how we see it. Whatever we do in the Maori situation we must avoid putting questions to a vote. Maori people generally do not do that. Instead, they will just talk and talk. Resolutions are seldom made, but people know what the decision is. Then you are expected as leaders to go away and work in accordance with the attitude expressed by the community. But the community also expects you to know things, because it is your job. If you don't front up to them how are they going to know? Not everybody trusts the news media.

Bing Lucas (Director-General, Lands and Survey Department)

I think you have touched on a very important point in indicating that the Official Information Act is more a matter of attitude than procedures. Recently, about 19 of us from our department were involved in a pilot course run by the State Services Commission in conjunction with the Wellington Polytechnic. It was held in conjunction with Maori Language Week, and Conservation Week, which coincided this year. The course was a 20-hour introduction to Maori language, culture, and land issues and was a part of the process of making the public service more sensitive to minority ethnic cultures in New Zealand. But what worries me is the pace at which we can communicate these ideas. Attitudes will change. Can they do so quickly enough? I know, for example, that there are many people around who become furious when the Maori news comes on air. I suspect that this reaction is all too common in this society we call multicultural. How, as a society, can we become more understanding of differing cultural attitudes and aspirations?

Kara Puketapu

I am very optimistic. And I believe there must be Maori initiatives. Once over the initial reaction, from some Maori and some non-Maori quarters, there is a surge of effort, understanding and confidence. It is a question of choosing initiatives and timing them, because I have had nothing but support from New Zealanders in regard to our Maori initiatives. You can do a bit through the news media and so on, but really you have to get people involved in your activities. It is not a happy experience for me to meet New Zealanders in their 60s and 70s who have never been on a marae. We only have ourselves to blame, all of us in New Zealand. It is a matter of providing opportunities. So too if we are administering the Official Information Act: we must not overlook the fact that we have got to provide opportunities for the community to participate.

Don McAllister (Victoria University of Wellington)

There is more than one tribe involved in all this. First, there is the bureaucratic tribe, and it is a pity that a little more wasn't said about that, because what I have heard being said here is that we have devised a system which allows agencies to make up their minds what they want to do without hearing what the people whom they are going to do it to think about it. Somebody said that we have a habit of adversarial confrontation. Once people tell us about this we get defensive. Perhaps we turn around and say that it is alright for the Maori people to talk things through but it is not alright for us. But, secondly,

I belong to a tribe called the citizens, and I don't want to be told what to do without being consulted, without fact-to-face contact. We have had non-Maori administrators in New Zealand who have done this — J. L. Robson and L. J. Rathgen, for example. So it can be done. Good administration does require face-to-face contact; it does require us to hear what other people are saying, and not to put a closure on it. But it is not just a question of informality; it is a matter of changing a whole working style. I understand you did find difficulty in getting some Maori officials to accept the new way of going about things. You have some Maori bureaucrats?

Kara Puketapu

Yes. We have been urging the Maori people to think Maori, because their own culture has been changing. We have been trying to get back to fundamental thinking about community, and away from that of self-interest. Within the Maori affairs bureaucracy that existed before, many excellent staff members felt that there was a certain official way to behave, but they have since changed their attitudes towards a number of things. They are stimulated, are enjoying their jobs, and are contributing a great deal more. They are thinking in terms of this fundamental principle of community, thinking Maori, and they are drawing on all their early experience and training within the public service, but re-applying it within the new format.

What I really want to emphasise is that while we now have a formal prescription in the form of the Official Information Act, it is down in the ranks that the action must take place. I would like to think that my ranks are not forgetting that the fundamental point about information is working with the community. Not sitting at a desk and writing out information, or watering it down to suit themselves, and getting around difficult requests. I want them to front up, because fronting-up is a wonderful, exciting, enjoyable experience for a public servant, although officials can be scared of it at first. Let's make sure that we administer this Act in the proper spirit.

A Study in Resource Use: Forestry

The Experience of the New Zealand Forest Service

Alan Familton

In this presentation I want to indicate the development and current status within the Forest Service of information availability, and participatory planning. I shall do so by answering three main questions:

— What has the Official Information Act meant to the Forest Service, and how has it affected its relationships with the public?

— What can the Forest Service experience (derived from anticipation of the Official Information Act) tell other agencies?

— In light of this experience what are the service's views on the utility of public participation in the policy formulating process? As a consequence, what should be done about the management planning process suggested to the public as a means to implement policy?

Before I go further let me mention some key words to which we should be able to make common reference, and let me also say something about the nature of forestry and of the Forest Service.

The important words are: *public; information; participation; policy; national; regional; evaluation; and submission. Public* means (a) a process of open discussion, debate, and consultation; and (b) collectively, the people of New Zealand. The process of regional resource management planning for indigenous state forests includes the making available of draft plans for *public submissions.* This implies the draft plan is freely available for anyone to read, and that submissions on it will be received from any person or organisation disposed to comment.

The Forest Service has assumed that reasonably full statements concerning resource management intentions will meet the public perception of *information* requirements. In fact, there has been criticism that recommendations and management prescriptions as outlined in draft management plans are an insufficient information base. Certain sections of the

Alan Familton is Assistant Director-General of the New Zealand Forest Service.

public have suggested that the basic facts and data used to derive management proposals should be available. Two problems emerge under the information heading: is the prime requirement simply to keep the public informed about forest resource development and management, or is the service providing an information base to allow public participation and input in designing the final government-approved management plan? These are two completely different concepts.

We have invited public *participation* at different levels and for quite different purposes in attempting to reach a consensus on national and regional policies for forest resource administration. In effect, we have said to the public: "Here is the government-approved policy for indigenous state forests in the west Taupo region. You, the public, participated in the production of the 1975 national management policy for indigenous state forests. You the public in 1978 took part in a public seminar and provided submissions from which a regional policy was produced for west Taupo forests. So here is a regional management plan for the indigenous forests of west Taupo. It is based on the approved policy, which has been through a public participation process. Let's know what you think of it." So begins the next level of public participation.

Ideally, the participation process allows government policy on forest resource development and management to be based upon public involvement and understanding. But what happens is that some interest groups have not agreed to certain elements of national or regional policies on indigenous forest management at the time when an apparent consensus has been achieved. The result is that very often when public participation is sought by the Forest Service on what is an instrument of an assumed policy agreement we see the policy attacked rather than the instrument. Policy cannot and should not be static, but neither should it be continually changing.

Apart from influences already noted in regard to policy, *national* interference with *regional* aspirations raises problems. Examples would be the stance taken by the Minginui villagers in response to a national movement to halt selection logging in Whirinaki Forest; and the attitude of *West Coast Futures* toward any national support for extension of national parks or other reserves in Westland.

By statute the Forest Service is exclusively responsible for the management of all state forest land. When public submissions are called for on its draft management plans the service is responsible for an objective *evaluation* of the comments and views received. Changes are made in the management plan on the basis of this evaluation. The amended plan and the analysis of submissions are then released for public reading. It is a time-consuming exercise of doubtful benefit.

Submissions are extremely variable as to source, content and quality. It is quite clear that many are responses from interested organisations rather than products of a detailed reading of a plan. It is not uncommon for interested groups or organisations to place their interpretation on the contents of a draft plan and exhort the "public" to respond to their interpretation. At worst, this can lead to a competitive numbers game with no rules to help determine a "winner".

Now to give a thumbnail sketch of the nature of forestry, which contains within it some basic conflicts. There is *resource use* — for example, logging operations, particularly in indigenous forests — and there is *resource creation*. If you look at the seried ranks of pine trees you see quite a considerable wood resource being created from the introduction of coniferous species into New Zealand. The millionth hectare of that resource is being established this year. Some of the operations that have gone on in our indigenous forests, in particular, are similar to mining operations in that the best quality timber has been removed while a lot of material that is unsuitable in the view of sawmillers and others has been left behind. But really forestry is all about a *renewable natural cycling* of a resource that is created through efficient use of climate and soil. Another problem we have been hearing a lot about lately is *overcutting* versus a *sustained yield*. If you regard the timber trees in a forest as money on term deposit you should not cut any more trees than the interest you get on the money; in other words, you should not cut more wood than the forest itself is capable of growing annually. In that way you get a cycling of yield that never really depletes your capital. Other values and arguments that arise are: *sustension of forest values;* a *multiple use concept* in the management of forested land, applying particularly to our state forest parks; and the *long term investment and planning horizons* that are necessary.

From the nature of forestry *per se,* we now move on to the nature of the Forest Service. Basically, it operates under four Acts, but it interrelates with many more. The four Acts that really control what we do are the *Forests Act 1949,* the *Wild Animal Control Act 1977,* the *Forestry Encouragement Act 1962,* and the *Forest and Rural Fires Act 1977.* In addition the service's functions inter-relate through the following statutes: the *Land Act 1949;* the *Water and Soil Conservation Act 1967;* the *Soil Conservation and Rivers Control Act 1941;* the *Wildlife Act 1953;* the *Mining Act 1971;* the *Town and Country Planning Act 1977;* the *Reserves Act 1977;* the *National Parks Act 1980;* the *N.Z. Walkways Act 1975;* the *Historic Places Act 1954;* the *Agricultural Pests Destruction Act 1967;* the *Litter Act 1968;* the *Noxious Plants Act 1978;* the *Statistics Act 1975;* and the *Coal Mines Act 1979.* The Forest Service is responsible for exclusive control and management of all state forest land. The Forests Act requires the undertaking of balanced use of state forest land, having regard to production of timber or other forest produce, protection of the land and vegetation, water and soil management, protection of indigenous flora and fauna, and recreational, educational, historical, cultural, scenic, aesthetic, amenity, and scientific purposes. Apart from land and resource management functions, the department has regulatory functions in terms of disease, wild animal and fire control operations, and extensive trading and commercial processing activities, including sawmilling and export sales of logs and timber.

Other functions include extensive research into forest resources, as well as wood processing operations; data collection and analysis to facilitate sectoral development planning; comprehensive staff training programmes to cover the full spectrum of sectoral manpower requirements; national

supply and wood requirement forecasting; and production of a range of publications reflecting the activities and development potential of the forestry sector.

I have been surprised that most public concern about forestry has been concentrated on the indigenous resource. From time to time concern is expressed about the relative merits of exotic afforestation as compared with agricultural use of land. However, I do not recall major petitions nor any public demand for large-scale national or regional seminars on the place and role of New Zealand's national plantation forests as a means to boost regional development, improve rural employment opportunities and diversify the country's export earning potential.

So much for the nature of forestry and the Forest Service. How, then, is the service's experience in public consultation and planning relevant to the Official Information Act? What lessons can be learned? Traditionally, the Forest Service has tried to keep the public *informed* on both accomplishments and potential developments in the forestry scene. More recently, efforts have been made to *consult* the public on management proposals for state forest resources. As I have indicated already, there is an important and fundamental difference between a requirement to keep the public informed on broad government policy, and the further step of consulting the public on the adequacy of measures proposed to implement such policy. It would benefit those seeking to promote availability of information, and public involvement in the use and interpretation of such information, if they were to distinguish between the level and extent of public consultation or participation at a policy definition level, and at the management/implementation level. Forest Service experience suggests the strong need to make such a distinction but the great difficulty in observing it. Thus, the 1974-75 Forestry Development Conference provided the opportunity for public participation and debate in the evolution of the finally approved Government Indigenous Forest Policy. However, for whatever reasons, there was an element within the public — most notably dedicated environmental and strongly supportive preservation groups — which never agreed with the general acceptance of that policy by most delegates to the conference.

This has had most important consequences in subsequent public consultation and participation procedures further "down the track", particularly in regard to regional resource management plans. What has tended to happen is that objections to the service's management proposals are based on disagreement with the national or regional policy rather than with the expressed intentions in the plan.

Quite often, therefore, public responses indicating major opposition to Forest Service regional management plans for indigenous state forests do not relate to a request for a public response to the contents or provision of a regional draft plan, but to the policy upon which the plan is based. But this policy will already have been through a public participation "wringer". The dilemma that emerges is the non-acceptance in some quarters of basic policy upon which subsequent public consultation is based. The minority opposition at the time of setting national policy may or may not become a majority public viewpoint in respect of a regional plan.

For a case study which has some interesting twists let me quote the actual impact of public debate and consultation on indigenous forest management proposals for state forests in the central North Island region. In 1978 a central North Island policy clarified local issues and established the basis for preparation of draft management plans for the west Taupo and Whirinaki forests. By the time these plans were drafted the general process of public participation in the production of indigenous forest management plans had been well and truly initiated either by ministerial announcements or through advertisements in the press inviting the public to examine the fairly technical management plans being produced, and to forward their comments to the Conservator of Forests. The attendant news media attention from this time was directly proportional to the level of controversy expected about a particular plan. In the case of west Taupo and Whirinaki various public meetings, displays, and tours were organised by the service and by various other interest groups who were sufficiently motivated to publicise their views and opinions on the draft plan. About this time the blue-wattled crow (kokako) emerged from the relative obscurity of its podocarp forest habitat and helped fuel a debate on the forest management options under discussion for west Taupo forests. A political promise not to take logs from Waihaha Forest, survival of sawmill communities, a concern expressed by many people that logging would endanger the survival of the kokako, the fate of very ancient totara trees, and the need to reserve representative areas of New Zealand's podocarp forest were all issues that were thrashed out in submissions on the 1978 draft management plan for west Taupo. A total of 1,735 submissions were received, 96 percent coming from individuals, families, worker groups, children, school classes, etc. The numbers game was upon us as various interest groups exerted what influence they could in seeking to persuade members of the public to reflect their views in submissions on the plan.

Management proposals were publicised for Whirinaki Forest in 1979. This set the stage for a battle of words, wits and occasional deeds (spear-headed by the "Minginui cavalry") as two distinct factions took up their cudgels. Environmental groups secured some 4,100 names substantially opposed to the plan. The local Minginui community rose to this challenge and was largely responsible for generating some 8,400 signatures in support of the plan. The issue concerning future management of Whirinaki Forest became completely polarised with no middle ground possible for compromise. In fact such was the style of guerilla-type tactics followed by the two opposing camps that Forest Service plans appeared to become almost incidental to the confrontation, debate, strategic planning and political reconnoitering going on between them. Whereas for the west Taupo indigenous forests the public debate, comment and submissions led to sawmills being closed, villages abandoned, legal commitments being paid off, and forest reserves and a forest park being created, the decision at Whirinaki meant logging continued, the sawmill remained operational (admittedly at a reducing scale of indigenous timber utilisation), Minginui village (and its cavalry) remained in existence, special forest areas were reserved and multiple use management practices were adopted.

A similar type of problem confronts us on the West Coast. In this situation we have organisations such as *West Coast Futures,* and various environmental agencies and organisations, who will produce their interpretation of the service's management plans in order to assist members of the public to make a submission on the plan. I have no doubt that various interest groups are actually prepared to make a submission so long as a member of the public signs it.

The dilemma, therefore, is how a sponsoring agency such as the Forest Service identifies public concerns which spring from a general groundswell of public opinion and belief, in the face of numbers game responses such as I have just described. If the criterion for assessment of successful public participation in management planning is the total number of submissions received then we have a successful system. Apart from the indigenous forest management plans involving production of timber the Forest Service has sought to involve the public in the management policy and practice of the 19 state forest parks, and in numerous other management proposals ranging from a management policy for the kauri forests in the north to exotic afforestation prospects for land subject to flooding in Southland. One problem that is fairly common to all efforts is to obtain any measure of the representativeness of the various public interest groups or public-spirited individuals who respond. For example, when the public debate on a West Coast forest policy was at its height I recall reading a forthright expression of opinion from a south Westland bush worker, somewhat as follows:

> *"Me and my mates don't agree with any further reservation of our bush. I have worked the bush for 32 years and if you and the government think we want to become dickey-licking tourist lackeys you'd better think again."*

As far as state forest parks are concerned we have a system of independent advisory committees which advise the Minister of Forests on management policy and practice for each park. A draft management plan is circulated for public information and comment and the advisory committee is consulted. The most recent example of public participation in the management of a state forest park concerns Kaimai-Mamaku State Forest Park. It is not my intention to attempt to justify the service's stance on the intended management of this park nor to criticise the position taken by various interest groups once the draft plan went out for public comment. However, if I am to use this example of public participation to help explain why we regard our experience as less than satisfactory, then it is necessary to give some technical background on the forestry issues involved.

Kaimai-Mamaku hit the headlines in 1973 when the first management plan was subject to public scrutiny. It has just been through the "wringer" again: the 1983 revision of the Kaimai-Mamaku State Forest Park Management Plan drew 1,227 submissions. The 1973 plan attracted 36. Despite years of careful management and liaison with local environmental groups, media information servicing, tours and display boards around the region, and numerous public meetings, the Forest Service proposals have been largely ignored, misunderstood or misinterpreted by most

respondents. Although no logging was proposed within the plan period, apart from possible salvage and limited trials, many respondents assumed that widespread logging was imminent. This completely erroneous assumption reflected the misleading construction placed on the plan proposals by certain interest groups. A newspaper advertisement which was also broadcast by local radio implied that the draft plan contained firm proposals on production and exotic planting that would destroy the character of the forest park. The final irony came when the account for this misleading advertisement was wrongly delivered to the Conservator of Forests. Perhaps the service did not explain its proposals clearly enough, but there was no intention to log 52 percent of that forest as indicated in the advertisement.

The forestry sector experience in the gradual evolution of a participating planning process over the last 10 years, and in the almost completely unconstrained release of information leads, in my view, to the following conclusions.

— In the resource management area the issue is not so much the availability of information as the wish by some recipients to participate fully in its use.

— The unrestricted availability of information does not promote a more rational integration of the factors relevant to a particular plan or discussion *unless there is a genuine consensus among all interest groups on the policy and the goals to be pursued.*

— Information availability is neither a panacea (the disputes are generally longer and more bitter), nor a placebo (the public certainly is not humoured). The widespread availability of information requires a universal capacity to absorb it: education is a vital key. Making information available carries no guarantee of its responsible use. In fact, the reverse may apply.

— There is a strong tendency for information to be selected to promote a particular (usually narrow, and single purpose) resource use, rather than to promote a wider debate on alternative uses of the resource.

— Societal demands which have led to the Official Information Act are not for information *per se,* but for the capacity to participate in decision-making processes. The avenues available are generally still unsatisfactory.

— While the framework for regional resolution of issues is in place, that at a national level is deficient, and these deficiencies can lead to regional problems (for example, the relative place of forestry and agriculture).

— Availability of a public process carries no guarantee of public interest or participation. It can, however, lead to difficulties in judging the representativeness of public interest group claims.

When I began this address I posed three questions, and I believe the background information in this paper supports the following responses to them. The first question dealt with the relevance of the Official Information Act to the Forest Service's relationships with the public. While it is possible the Act could increase the depth and detail of information

available it is unlikely to have much impact for the public generally. The Act has not made much difference to us so far. Information being sought from us since the legislation came into force tends to be that pertaining to the policy level — for example, advice offered to the minister and so on. Factual information is not a problem: there seems to be little perceived need for it. Rather, what matters is the desire to succeed in influencing or determining policies.

The second question addressed whether the experience gained by the Forest Service in this respect could be relevant to other agencies. This may be a somewhat presumptuous question. The answer is for other agencies to decide. For our part, I believe we need to amend some of our present procedures, particularly those relating to public submissions. These could be described as an exercise in predictable futility. We could write the submissions ourselves at the same time as we prepare the plan because we know fairly precisely what the responses will be when we put out the plan. Then why don't we change the plans in anticipation of the response? Because I think the problem really is the lack of agreement on the basic policy that underlies the plan, and the politicisation of the submission process. That process is not really designed as a referendum or poll, but this is what it turns into — with all the attendant distortions associated with electioneering.

The third question concerned the utility of public participation in policy formulation and subsequent management proposals. This paper indicates that some improvements could be made. We should develop concise policy statements for all forested lands of the Crown. Such statements may need to specify national policy for all forests under state ownership; indigenous and exotic state forest management policy; regional management policies upon which to base regional management plans; specific policies such as the kauri management policy, for podocarp species, tawa, beech and various special purpose exotic species. On the basis of a clearly understood and accepted series of policy statements plans could be prepared and circulated for comment on proposed management intentions rather than on basic policy. To assist the public with interpretation well-illustrated summary plans in the style of the Paparoa brochure should be made freely available. The detailed draft plan would be supplied on request. For each regional management plan a factual publicity package including material for the news media, public meetings, field trips and general information could be made available before the plan is released. Appropriate interest groups could be identified and their comments invited on their respective areas of concern. The following list is indicative. *Environmental:* Native Forests Action Council, Royal Forest and Bird Protection Society, Environmental Defence Society. *Recreation:* New Zealand Deerstalkers' Association, Federated Mountain Clubs, various national sporting bodies, acclimatisation societies. *Soil & Water values:* catchment authorities, National Water and Soil Conservation Authority. *Forest resource and wood utilisation:* timber industry associations, New Zealand Institute of Foresters. *General:* other government departments, local authorities, regional interest groups and agencies, universities. On top of that we could scientifically sample public opinion through independent polls and/or research — university con-

tracts, specialist consultants, and the like. And we could ensure co-ordination between central and local government by formalising a consultative process between the minister and local authorities.

If improvements along the lines suggested were to be effected then several advantages would follow. It would be easy for the public to identify whether the proposed management of the state forest resource in their region complied with national and regional management policy. There would be improved public understanding of the role and function of national and regional forest resources; better consultation and understanding between central and local government, and between national and regional interest groups; more constructive and informed criticism on the content of a plan, rather than polarised public views on policy for which the plan was to give effect; and less emphasis on the numbers game and the expense, time and effort devoted to collecting signatures — which would allow for greater concentration on issues of substance, and a more useful public response.

A concentration of thought, effort and constructive comment on ways and means to improve resource management is needed for regional and national benefit. Genuine concerns, whether about the future well-being of the kokako or the survival of a rural community, will surely be best resolved by logical and factual assessment and debate. A confrontationally-styled, head-counting propagation of selected, often emotionally-based distortions of the full picture is not public participation, is not in the public interest, and possibly not even in the kokako's interest.

The Native Forests Action Council: An Alternative Viewpoint

Guy Salmon

I should start with a brief description of what the Native Forests Action Council is, and what it has done since 1975 when it was formed. In that year NFAC began with a statement of its basic philosophy — the Maruia Declaration — named after a rather beautiful valley of beech forest in the South Island where the council was launched. That declaration went on to become a very large petition, 341,160 signatures, calling for greater protection of New Zealand's native forests. In fact, that is the largest petition ever in New Zealand's history. We have run a series of campaigns to save particular areas of forest, and have had some successes in south Westland with the Okarito and Waikukupa forests being added to Westland National Park, and in the central North Island, with Pureora and Horohoro forests. And we have been involved in a number of other preservation campaigns.

Guy Salmon is Director of the Native Forests Action Council.

We have also been active in persuading the Forest Service to change its management practices from a clearfelling, non-renewable approach to a sustained approach to the resource; and we have been involved in successful efforts to have price control removed from native timbers so that the price of those timbers can rise, reflecting their true value and securing a more appropriate use of them.

NFAC has been a major user of official information. It has a staff of six professional people in Nelson working full-time, and in the last two years it has been involved in a coalition with three other conservation/recreation organisations — the Royal Forest and Bird Protection Society, the Federated Mountain Clubs of New Zealand, and Environment and Conservation Organisations of New Zealand (ECO). Also, being under the umbrella of the Joint Campaign on Native Forests has made available to NFAC additional funds and professional resources.

Our organisation has tried to approach conservation issues not by presenting a simplistic "green is great" argument about the forests being beautiful, but by working for an integrated approach to conservation and development as set forth in the *New Zealand Conservation Strategy.* The two major conflicts that have emerged in our efforts to preserve native forests have centred on jobs for people dependent on sawmilling from native forests, and the need for a long-term supply of decorative native timbers for the building and furniture industries. We have tried to develop balanced policies so that these conflicts of interest can be successfully managed. Our need for official information derives from our desire to participate in the striking of balances in policy formation. We are not interested in simply being informed of what decisions the Forest Service is making for us; rather, we are seeking to adjust the balance in those decisions by putting forward an alternative strategy to that which the Forest Service has presented in a series of regional management plans.

We keep our membership involved through our magazine, *The Living Land,* and we also circulate the little publication, *Bush Telegraph,* to the member organisations of the Joint Campaign. So this reaches about 50,000 people.

So much for introductory background. I should now like to begin my paper with a press statement made by Mr Venn Young, who was Minister of Forests in 1976. In it he claims that the Forest Service "operates a policy of full disclosure of relevant information." Political statements of this kind are, of course, commonplace in the information field. What is interesting is the degree to which they are actually implemented. At the time the minister's policy statement was made Forest Service officials continued to maintain attitudes favouring non-disclosure of much relevant information. The intervening years have seen a gradual liberalisation, so that in 1983 one could say that Mr Young's statement is truer today than it has ever been. Full disclosure is a concept that is continuing to evolve, and I think there is considerable scope for the minister's original statement to acquire even more truth and substance in the future.

The attitudes of officials are going to be a key factor if this evolution is to occur. It is instructive as a starting point to capture the flavour of the era we are supposedly just leaving — the "bad old days" before the Official Information Act came into being — and to reflect on the nega-

tive, and one suspects rather durable, official attitudes that have often confronted the information seeker. I shall simply take some quotations from letters written to or about NFAC by five government agencies in response to or in anticipation of requests for information.

The first example is from the Lands and Survey Department, and is dated 15 January 1982. The Commissioner of Crown Lands in Nelson responded as follows to a request from NFAC for a botanical report on an area of nature conservation interest:

> *"Thank you for your letter of 11 December in which you ask me to confirm that I will release a copy of my internal office report on bog pine areas in the Tutaki Valley. As a general principle I am not prepared to release internal reports of this nature".*

The second example is a request to the head office of the Mines Division of the Ministry of Energy, to make available some information it was preparing for an officials committee. It drew the following rather belated response, dated 10 January 1979:

> *"Your letters of 25 August and 20 December 1978 have been received by this office. The delay in replying is regretted, but the motives of your organisation are not appreciated by Mines Division, and your research has been given a low priority until some free time becomes available here."*

The requested information was not supplied.

Example number three: NFAC became aware of the possible existence of an internal Forest Research Institute report on the results of selection logging at Whirinaki State Forest. The existence of the report was confirmed when references to it were found in a submission made by a pro-logging lobby group a few months before the government's decision to continue logging in the forest. The director of the Institute delayed responding for more than 14 months to repeated requests from NFAC for the release of this report, while government decisions on the future of the forest were being taken. He then finally refused to release the report, and also declined to explain the circumstances under which it had been released to a pro-logging group. His letter dated 25 August 1980 concluded as follows:

> *"The Native Forests Action Council seems to be remarkably well informed about various internal FRI documents. I should like to know how you come by this information, because it could be inferred that you might already have obtained access to the document you request. Is this so? If so, I should like to know the circumstances."*

I should say that NFAC has still not received this report, or seen it, and it will no doubt be published in a scientific journal after the whole forest has been logged.

Example number four is a circular from the Forest Service's Director of Research to members of a scientific co-ordinating committee which makes recommendations for ecological/scientific reserves in state forests. The confidential status of this committee's minutes, reports and recommendations was uplifted by the Minister of Forests last month, but the situation

was very different on 20 September 1976, when a circular letter was mailed to committee members. It contained the following:

> *"Members may recall that one pressure group published material that could only have come from a computer printout of the original reserve areas in the West Coast Beech Project area. I now enclose a copy of an item from the* N.Z. Herald *of 13 September which shows that Action for the Environment has in its possession the minutes of the 6th meeting of this committee. I am advising the Minister that I am quite confident that no committee member would make these documents available to pressure groups, and that I regard the matter as one of simple theft. As theft is a criminal offence, I shall have no hesitation in recommending the application of the law should the identity of the thief be ascertained."*

This circular was sent out only 10 days after the then Minister of Forests' public statement proclaiming the service's policy of full disclosure of information.

My final example concerns the head office of the DSIR, which sent the following comments in a letter to one of its botany division scientists, who had authored a report recommending some forest reserves in south Westland. It's dated 18 June 1976.

> *"Mr Young, who is minister of both departments, has asked for firm recommendations on reserves by the end of the year. New Zealand Forest Service wants your report to remain confidential to the departments concerned. In view of the way in which the Forest Service has been harassed by organisations such as the Native Forests Action Council, I consider this is a reasonable request, so would you please confine the distribution of your report to those government departments who are directly concerned with the establishment of reserves in Westland . . . Is the Native Forests Action Council aware that you have produced a report? I appreciate that they could make quite a fuss about alleged suppression of information, so if they have no definite information about the report, I suggest you keep it that way."*

The above quotations reveal attitudes on the part of generally senior officials which are far removed from the formal policies of full disclosure of information that have been loudly proclaimed by ministers. It is apparent that members of government organisations quite often regard official information as the private property of their organisation. The absence of a positive concept of the role of information in a democratic society can lead to restrictive attitudes by officials toward even quite minor releases of information. Worse still, an actually negative attitude toward the participation of so-called "pressure groups" in public decisions can lead progressively to a rather defensive mentality.

Naturally, this is reinforced where groups of officials are philosophically committed to one view of a resource and of how it should be used, and when citizen organisations are campaigning on the basis of a different view and a different philosophy. Officials may see the citizen groups as emotional, as irrational, or as holding a distorted or a biased viewpoint. When seeking official information citizen groups may also be seen by

officials as posing something of a threat to the perceived goals and plans of their own organisation. Thus it happens that officials sometimes come to believe that they can and should defend themselves by finding ways to withhold particular information which could be used to challenge the policies or actions of their organisation. The evidence cited above also suggests that in making decisions about the release of information some officials are not always even-handed but allow themselves to be influenced by their personal likes or dislikes of the views or activities of those who seek information.

Problems of this kind are heightened when, in debates over the use of public resources, a group of officials or a whole department assumes the role of protagonist. For example, in native forest issues it not infrequently happens that in certain regions the Forest Service and its staff are virtually the sole source of advocacy for the logging of native trees. Alan Familton has given you a couple of examples where the argument was between conservationists and local communities dependent on sawmilling. I think those tend to be the exceptions. What is more characteristic, and we see this in the Kaimais, the Raukumaras, or in the Pureora forest for example, is the situation where the only arguments advanced for logging the forest come from the department, which has published the proposals and is itself sitting in judgement on the submissions it receives. There is no other source of advocacy; there is no public demand for logging; there is no dependent sawmill; there is no sector of industry which wants the timber. There are simply officials in a government department who want to be able to practice their management skills on native forests. So conservationists have naturally come to resent the fact that when native forests go on trial the Forest Service not only plays the role of prosecutor, judge, jury, and executioner, but can even control to a considerable extent the availability of evidence for the defence. Under these circumstances it should surprise no-one that there are sometimes some angry scenes in the courtroom.

It is important to appreciate fully the purposes for which information is sought by a conservation organisation like NFAC. It is sought primarily for the purpose of formulating integrated conservation/development policy strategies. (Another, less frequent reason, is to gain a better understanding on how the governmental policy-making machinery works.) With such strategies we aim to influence public policy, and accordingly the strategies proposed must be technically and economically viable. They must have sufficient political support or appeal to commend themselves strongly to the government of the day.

The importance of *integrated* strategies needs to be stressed, for two inter-related reasons. Firstly, conservation is not a complete philosophy of action in itself. It needs to be combined with a philosophy of development — using that word in its widest sense, as perhaps would a psychologist, an educationist, or an economist — if it is to be fully meaningful. Secondly, in a democratic society where there is substantial evident support for social and economic development, conservation causes will advance politically to the extent that their goals can be integrated in a balanced relationship with development processes. Not just the policy-makers but also members of the public require more of the conservationist

than a simple protest or a rather inchoate green argument. Integrated strategies for conservation and development are needed today, and these must be based on comprehensive information.

Three implications for information requirements should be noted here. In the first place, the need is not entirely, or even primarily, for environmental information. All the information relevant to resource management is needed and this includes information on employment, economic analyses, land use potentials, regional aspirations, the viewpoints of other lobby groups, government contracts with resource users, market studies, and government policy factors. Secondly, the information must be timely, or it is useless to us. From the first announcement of management proposals of any kind to the time of a final government decision on those proposals a rigid time line and a rigorous programme of work is imposed on conservation organisations. Comprehensive information must be obtained at an early enough stage to allow time for analysis and full understanding of the issues, for the research and development of integrated policy strategies, and the advocacy of these to government and to the public. Somewhat similar requirements are imposed on us by the scheduling of local authority and Planning Tribunal hearings. And thirdly, the formal system for release of information must ensure that requested information relevant to imminent government policy decisions can consistently be provided, regardless of whether or not the officials authorising the release happen to agree with the viewpoints, policies and activities of the applicant. This is an important factor for conservation organisations seeking information from the Forest Service or the Mines Division. It has significant implications for the formulation of *administrative* reasons for the non-release of information.

I would like to say something about trends in the release and use of information over the years since 1975, when official secrecy first became a major issue.

There has been a growing liberalisation in the release of official information. Examples of this are numerous. As I've mentioned, the first official release of the minutes of the scientific committee which deliberates on reserve requirements in state forests occurred last month. This is the same committee whose minutes were regarded as stolen documents back in 1976. An officials committee which looked at reserves and development options on the West Coast in 1978 and 1979 reported to cabinet in secrecy, while a similar committee operating at present has seen its interim report publicly released, and has consulted widely in the preparation of its final report. This is a very significant change in the work of this type of officials committee. Internal reports of the Forest Service surveying the wasteful end use of native timber and the wasteful use of West Coast forests arising from government policies of the day, and which caused a furore when they were first leaked and published, were subsequently put to constructive use by conservation organisations in submissions on forest management plans, and in successfully pressing for the removal of price control from native timbers. Today the public release of similar reports seems to be fairly automatic.

Details of the native timber volumes committed in long-term sales contracts were first released to NFAC in 1975. Details of royalties paid were

released not long after and in 1979, following an appeal to the ombudsmen's office, details of the extent of effective taxpayer subsidies for the clearfelling of state indigenous forests by a woodchip company became public. More recently economic analyses which show existing land clearance and afforestation policies to be economically marginal, or quite uneconomic in some cases, have seen the light of day. Reports on employment and social factors, particularly those commissioned by the Town and Country Planning Division of the Ministry of Works and Development, have generally been made readily available although an appeal to the ombudsmen had to be made in one instance, and there was a prolonged, unexplained delay in the release of the West Coast Resource Development Study. Noteworthy also has been the willingness of several private sector organisations, particularly some timber and mining companies, to discuss their development plans with NFAC in a reasonably open fashion and at an early stage. We welcome that.

A second trend has been toward more effective use of information by conservation organisations themselves. Having adequate professional staff and volunteer professionals available to analyse critically the veritable flood of information that can be obtained from government today has become the greatest single constraint on the extent to which we can make timely contributions on major policy issues. The recent central North Island Planning Study provides an example of the magnitude of the documentation that is now made publicly available for important policy reviews. However, it is a fact that conservation organisations have grown in resources, experience, and professionalism in recent years, so that we have been able to generate a series of substantial and influential reports and submissions while maintaining a flow of simpler informative material to aid the participation of our membership. In retrospect some of our earlier attempts to come to grips with official information now appear somewhat misdirected in that we sometimes had an insufficient grasp of the real issues, sought excessive detail, gave undue weight to information from certain sources, and generally wasted a certain amount of effort. The continuing availability of information on the government process has enabled us to recognise and largely correct these errors, enhancing our effectiveness in determining the information we need and in using it when it is available.

A third trend may be described as the democratisation of the participants in the information-sharing process. Officials have become more accountable and have been increasingly obliged to consider their reasons for adopting or not adopting policy proposals. Conservationists have become more aware of the multiplicity of factors which officials have to consider in formulating policies in a democratic society. We have increasingly come to grips with these factors, rather than simply advocating our own cause or interests in splendid isolation. These developments are healthy ones for the balancing processes of a democratic society, and we have the liberalisation of the flow of information to thank for them.

Looking now at the new Official Information Act, I believe that it is too early for us properly to assess its impact. Refusals have been encountered but the review process has not yet been tested. We expect that

section 9(2)(f), which provides that the maintenance of constitutional conventions may be a ground for the withholding of information, could be a major area of difficulty. The Danks committee intended that such provisions may protect "internal and interdepartmental minutes, reports and recommendations, and advice by public servants to Ministers"[1]; and although such documents are not automatically exempted the discretion here is wide indeed.

Recently NFAC requested from the Forest Service copies of the advice given to the government on the adoption of its major indigenous forest logging policies. The department has agreed to release these documents. When they are available the reasons given for continuing to cut down native trees on a large scale will become public for the first time. A matter still to be resolved is the price tag for this information, which the Forest Service has fixed at $250. However, the willingness in principle to make available policy advice to the government is significant and commendable.

This decision does, of course, relate to policy decisions already taken, albeit recently. Whether departmental advice on policy matters about to be decided will be made public as well is more problematic. However, if the release of the last few years' advice on native forest policy matters is not considered to have inhibited unacceptably the free and frank exchange of opinion or to have prejudiced the political neutrality of officials, then it is difficult to see that the release of advice given this year by the same officials on similar issues could damage these constitutional conventions.

It is also a fact that the advice tendered to the minister by the Forest Service is often made known to members of relevant forest park advisory committees before decisions are finalised, and thus becomes fairly widely known. At times the minister prior to taking the final decision will himself publicly disclose the advice he has received, allowing the possibility of last-minute representations for or against, or refinements to the pending decision. This open procedure seems to be an excellent way of conducting the government's affairs, at least in this sector.

Indeed, in our experience constitutional conventions have rarely been invoked as reasons for refusing disclosure of information. In fact, the giving of principled reasons of any kind for non-disclosure is extremely rare. Refusals to supply information continue to be frequent, and they are based almost wholly on reasons of administrative convenience. Three administrative reasons for non-disclosure are now rather loosely defined by the new Official Information Act in sections 18(d), (e), and (f). Section 18(e) provides that information may be refused if the document alleged to contain the information does not exist or cannot be found. A typical example of the type of refusal received under this category is the following:

> *"Report on the Ohikanui River Valley: There is no report as such . . . No copies are held here or at our head office."*[2]

However, a copy of this "non-existent" report authored by two forest service officers is held on the files of NFAC. It had been temporarily mislaid at the time we needed it, and a further copy was requested from the service. It was a significant report, which the service did not wish

to see released, probably because it dealt with disagreements with DSIR scientists. I hope the broad definition of a document provided by the new Act (including "any writing on any material") will embrace this type of report in future.

Section 18 (d) gives as grounds for refusal that the information requested will soon be publicly available, while section 18 (f) gives as grounds that the information requested cannot be made available without substantial collation or research. The great majority of refusals by the Forest Service to supply information have been based on these two administrative reasons for non-disclosure. They relate to the desire by the service firmly to control the timing and nature of information promulgated on its activities and policies by periodically releasing management plans. This means of controlling the release of information as presently practised has a definite effect on the availability and usefulness of any information released. To appreciate this it is necessary briefly to describe the operation of the management plan system.

In the case of sizeable areas of indigenous state forest the Forest Service normally publishes draft management plans and invites public comment on them. A three-month period is provided for comment, after which submissions received are summarised in a report to the minister. Departmental recommendations for any amendments to the management plan are also made in a report to the minister, who finally amends or approves the plan. Management plans normally define management strategies for the forests. The meaning of the concept of a management strategy is perhaps best explained by characterising two alternative strategies proposed for the native forests of the Buller region. One, by the Forest Service, involves replacing a portion of the native forest by fast-growing exotic plantations, and then cutting through the remaining merchantable native forest in a 30-year period so that it is entirely logged out, with the mills then being changed over to exotics. The alternative strategy, put forward by conservation organisations, is to avoid the conversion of native forests to exotic plantations, and to reduce the level of cutting in the native forest to a level which can be sustained in perpetuity without the use of exotic species. As far as other elements of the two strategies are concerned, the Forest Service has chosen to oppose the creation of a Punakaiki national park, and more reserves as recommended by the DSIR, whereas the conservation organisations have favoured the proposed Punakaiki national park, and have supported the additional reserves requested by DSIR. A final difference between the two strategies lies in their socio-economic impact. The Forest Service strategy is designed to maximise employment in its traditional client industry, the timber industry, whereas the conservation organisations' strategy is designed gradually to reduce timber industry employment, and to develop other employment opportunities, in tourism and in the agricultural development of the very large areas of land in the Buller which have already been cleared of native forest.

NFAC has had to obtain information to document in some detail the advantages and viability of its own strategy proposal. For organisations like ours the prime goal of obtaining official information is to be able to participate meaningfully in management decisions, particularly in the

choice of management strategies for major forest areas. This may involve suggesting amendments to a Forest Service strategy, or proposing an alternative strategy, as in the Buller case. The starting point for such participation is normally the disclosure of draft Forest Service management plans. In practice, however, effective participation has often been made difficult or unsatisfactory by the timing of the release of these plans. The release of most of the major regional management plans to date, together with the plan for Whirinaki State Forest, has been timed in such a way that the important management strategy decisions have in most cases already been taken and acted upon. For example, in the case of the draft north Westland management plan, decisions on the two major parameters of the plan — the area of reserves to be set aside, and the timber cutting rate — had both been finalised before the plan was published. In the case of the south Westland draft management plan, a major decision to make a 60 percent increase in the annual permissible cut of sawlogs committed under long-term contract for supply from the forests was taken and implemented just prior to the release of the draft management plan. In the Whirinaki forest case, a government decision which committed the forest to sustained yield selection logging was taken a few months before the management plan was published for public comment.

In Buller, the draft management plan was ostensibly published to allow public comment on options for the implementation of the government's 1978 West Coast Forest Policy. However, the decisions on which areas of forest were to be reserved and which were to be made available for milling were again decided beforehand. Six-year timber supply contracts at a high rate of cut were signed up with local sawmillers before the plan was published. A further controversial feature of the plan — the conversion of areas of native forest to exotic timber species — was substantially implemented before the draft plan was published. In other words, at the time the proposals first became public 40 percent of the area to be converted to exotics had already been clear-felled and burnt, and the new trees were being planted.

It almost appears that the scheduling of the release by Forest Service of information on its major management proposals has been designed to ensure that the resulting public submissions will have minimal effect on the future management of these forests.

In defence of their timing of release for the various West Coast plans the Forest Service claims that there had already been much information released and an opportunity for public submissions following a seminar on the subject convened in Hokitika in 1977. However, while basic data was presented at this seminar there were no firm management proposals available for comment at that stage. Immediately following the seminar much of the basic data was also changed. Forests were reclassified; the timber volume estimates for south Westland were revised downward by 27 percent; volumes committed to sawmills were changed; timber price control was removed; new information led to revised proposals for reserves in several areas; and the selective logging technique being relied on for sustained yield timber management in south Westland was pronounced by the Forest Service's own experts to have failed. The information made available at Hokitika, and the submissions based on it,

was well out of date. The fresh information and proposals should have been published before major decisions were committed.

The Forest Service frequently declines requests for information on specific matters on the grounds that the information sought will be published shortly as part of a management plan. This practice may be expected to continue under section 18 (d) of the new Act. Plans often take months or even years longer than originally indicated to bring to publication and, as we have already noted, management decision-making and forest operations continue in the meantime, often substantially closing the options available. Timely information, had it been released, might have been used to influence the choice of those options. The value of the information is therefore greatly reduced by the delays in releasing it.

When a draft management plan is finally released three months is available to request supplementary information and to prepare and present amendments or alternatives to the plan. This is a tall order in the time available, and a major problem is the obtaining of sufficient data to analyse and compare alternative, integrated management strategies. Because the plan is often produced to justify pre-determined management decisions, rather than to present optional proposals, it normally proves to be lacking in the type of information which could be used to define alternative strategies. The inevitable result is a sudden flow of information requests to the Forest Service, which places considerable pressure on the department's resources at the time when a major plan is open for public submissions.

The Forest Service's policy for supplying the information is, "To answer in detail any enquiries for which the information is readily available or accessible, and to answer, as far as constraints on staff time and work pressure permit, those enquiries for which the obtaining of detailed or new information would be a major project in terms of manpower effort".[3] The department also claims that, "many of the Native Forests Action Council's requests could be classed in this latter category", and it adds that, "the task of public consultation has been undertaken by the Forest Service under the prevailing disadvantage of the government's 'sinking lid' staffing policy".[4]

The result of these factors — coupled with the crowding of information requests into a short time period by the management plan procedure, and the apparent failure of the Forest Service adequately to order its staffing priorities at this time in relation to the statutory procedures for public consultation — leads to a situation where a large proportion of information requests are quite simply frustrated. The service cannot reply; it does not have the time to find the information on its files; its draughting staff cannot provide the map; they will be unable to reply for some months; and so on. Section 18 (f) of the new Act provides considerable scope for these circumstances to continue.

The important decisions have not always been taken before plans are published but, even when they have not been, a particular management strategy is normally propounded vigorously and publicly by the Forest Service. In such cases, for public representations to obtain the adoption of an alternative strategy, the departmentally favoured strategy must be

effectively challenged and overturned. The presentation of a convincing alternative requires a great deal of information, while the ability to obtain from the department information needed for this purpose is almost certainly reduced by the strong commitment of staff to their preferred alternative, and their reluctance to furnish any ammunition for groups which they regard as "the opposition".

Many of the problems of the management plan procedure were greatly reduced on the one occasion — the draft King Country management plan — when the Forest Service avoided all prior commitments, presented a series of options supported by relevant information, and did not commit itself departmentally to any of the options when releasing the plan.

The next stage after the management plan has been open for public comment is the preparation by Forest Service officers of a summary of the public submissions received. The release of those official summaries, and indeed access to the actual submissions made on the plan prior to ministerial decisions on revised management plans, have been permitted by the Forest Service in the past, but this practice now appears to have been suspended.[5] The submission summaries constitute a valuable outline of the issues of concern to other parties with an interest in the final decision. Efforts to reach a large measure of agreement or to find a widely supportable compromise have in the past been facilitated by the availability of these official summaries. The summaries also provide an important indication of the balance of interested public opinion on the issues, and this itself should be made public. An instance of this was the claim that while conservationists generated 4,000 written submissions on the management plan for Whirinaki Forest, the Minginui village somehow managed to find 8,000. When the summary of submissions was finally published we found that the actual submissions that had been written numbered 4,000, and almost all came from the conservationists. The 8,000 signatures came from a form letter, which was supplied by a sawmilling company and hawked around the village and around Rotorua. The two categories of submissions were not comparable in terms of the amount of thought, analysis, and study that had gone into them.

Administrative exemptions in the new Act permitting non-disclosure are now being invoked by the Forest Service. Summaries of submissions received by the Forest Service up to three years ago are being described as not yet prepared, and so in terms of section 18 (e) they are documents which do not exist. Further, other submission summaries not yet released two and-a-half years after the closing date for submissions are still being withheld on the basis that they are soon to be published. However, the intention is that these summaries will not be released until after the Minister has finally approved amendments to, and signed the revised management plan. This situation is entirely unsatisfactory from the point of view of public participation, and is a retrograde step in relation to the Forest Service's previous practice in this area.

I come now to my conclusions. In presenting these I must say that no-one could overlook the substantial advances made in information disclosure by the Forest Service, and by other natural resource-oriented departments since 1975. Equally, however, it is impossible to overlook the fact that many of the most significant decisions for indigenous forest

management taken during this period have been discussed, developed, and decided in secret. Not only that, but the rather stage-managed system of information disclosure via management plans that is purported to provide opportunities for timely public input into such important decisions has, in fact, been operated as a sort of sideshow. In many instances which I have discussed here the guiding principle seems to have been "take decisions first, and release information later".

Most of the interest and debate at the time the Official Information legislation was considered by Parliament centred on the principled exemptions, described as being "conclusive reasons to withhold information", in section 6; "special reasons" to withhold, in sections 7 and 8; and "good reasons", in section 9. However, the reasons actually being given by the Forest Service for most refusals to date fall into none of these categories. Rather, these refusals are based on administrative reasons that the Forest Service has almost always used to refuse information in the past. They may also provide the basis on which it can continue to frustrate requests for information, or delay the release of relevant information until after executive decisions have been taken.

Any system for the release of official information must rely to some extent on a measure of goodwill on the part of officials who administer the system. Yet a system which relies too much on these qualities, and too little on formal requirements and on independent review seems unlikely to succeed. Regrettable though it may be, a set of formal procedures that can operate effectively in an adversary situation is surely essential in New Zealand. It is difficult to envisage how sections 18 (d), (e) and (f) of the new Act could be worded tightly enough to prevent abuse while still serving their legitimate, intended purpose. This is particularly the case when ministers retain a final right of decision over information released by their departments.

Perhaps, in this particular case, a remedy for the problems which I have identified may lie not so much in amending the Official Information Act but in amending the Forest Service's own Act, the Forests Act. This piece of legislation currently confers an extraordinary degree of power, discretion and flexibility on the minister and his department. The difficulties I have described in relation to management plans could be greatly reduced by a series of amendments to the Forests Act. These would ensure the following: that ministerial and departmental decisions are made in accordance with management plans; that publicly notified review procedures are used for changes to management plans; that management plan reviews include the presentation of options with supporting data for those options; that the department and the minister refrain from committing themselves to particular options until the public submissions have actually been received and considered; and that deadlines be provided for the summarising of submissions and the release of summary reports.

I believe that these changes, taken in conjunction with the existing provisions of the Official Information Act, would provide a firmer basis for the effective and timely release of information useful for public participation in management planning. Incidentally, they would also reduce the scope for arbitrary, centralised and secret decision-making by the executive arm of government in the field of forest management.

I should like to add some further comments, if I may. I sense a question arising in your minds: why would any good, honest, objective official want to do the things that I have been talking about? The answer to that can perhaps be found by analysing the three major interest groups that have strong convictions about the use of our native forests. The first group is the conservationists, and I have said enough about their viewpoint. The second is what you might call the social lobby — people who are concerned about jobs. They can be satisfied by a compromise which supplies enough exotic logs to the sawmills to keep people in employment, while keeping some in reserves to satisfy the conservationists. The third interest group is the forestry profession. It comprises a group of people whose training primarily is in the manipulation of trees to produce timber. They are also trained to produce other commodities besides timber, but timber is the aspect of forest management that has the greatest appeal to them, and gives them the greatest economic significance in the community. Most foresters work for the Forest Service; almost all pick up their intellectual baggage at a single forestry school; they gain their early employment experience in small timber towns, and pick up some of the values and attitudes which are representative of those towns, but not necessarily of the rest of New Zealand; and they find careers in large government and private enterprise bureaucracies, where following the policy line rather than debating it in an open fashion has been the key to professional advancement.

Under these circumstances we have developed professionals who like to manage forests for timber production, and who — unlike other professionals, such as engineers, architects, and lawyers — are not accustomed to robust internal or public debate of their philosophies and viewpoints. Foresters are an introverted profession, and members hold a remarkable uniformity of outlook, with considerable emphasis placed on maintaining a common front and on reinforcing professional *esprit de corps*. The Forest Service has exclusive control over the management of state forest land; and thus the fact that almost all the senior decision-making and planning positions in the Forest Service are in the hands of members of the forestry profession illustrates the almost unique dominance of a single professional group over one of New Zealand's main natural resources. The diversity of professional groups that one finds in, say, energy policy is not present to nearly the same degree in the case of forestry.

In summary, great power is conferred on a rather single-minded profession. That profession is intensely committed on the issues; it is in no sense a neutral party in the debates over native forest management, nor in the generation and release of information for those debates. In these circumstances lies the source of many of the problems I have described.

References

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2. Conservator of Forests, New Zealand Forest Service, Hokitika. Letter to NFAC, 14 September 1981.
3. Chief Ombudsman. Letter to NFAC, 27 July 1982.
4. **Ibid.**
5. Director-General of Forests. Letter to Joint Campaign on Native Forests, 27 July 1983.

Discussion (of both papers)

Jeff Connell (Ministry of Transport)

I would like to ask Guy Salmon two questions. Since the Act became effective have you asked the ombudsmen to review any of the Forest Service's refusals to supply information? My second question is one about ethics. It concerns unauthorised leaks by people who do not have authority under the Act to release information. I would be interested in hearing about your organisation's attitude to unauthorised leaks, now that the Official Information Act is in place, because prior to its enactment we had the Official Secrets Act which clammed up everything. An organisation like yours might have been forgiven for taking the view that an unauthorised leak of information could be published in the public interest, because you had no recourse to challenge its refusal. Now that you have a mechanism whereby you can challenge the correctness of a decision to refuse information, will you continue to accept unauthorised leaks and to use them?

Guy Salmon

We have not as yet used the ombudsmen, but we intend to. We have had some useful assistance from that office in the past. Regarding your second question, it's true to say that one of the reasons the Official Information Act was passed and the Official Secrets Act repealed was that documents were being leaked. As a result of that the public was able to become aware of the type of information that was being kept secret. It is certainly true that back in the 1975-77 period a number of such documents were published. We have not done this for some years now because of the liberalisation which I have described, and because we want to give the Act a fair go. There is a long way to go yet before the potential of the Act is tested to its limits, particularly in that area relating to constitutional conventions where interpretation is going to be a cumulative process. In the meantime, if we receive any interesting leaked documents we shall request their release officially.

Robin Cutler (Forest Service)

Guy Salmon, one of the cases you quoted earlier was the internal Forest Research Institute report on selection logging at Whirinaki State Forest. But you were given a very good reason why that report was not released, and it's the same reason that you have given why you want information — so that you can produce reports that are professionally competent. That particular internal report was written by one scientist, it was in draft form, and had not been refereed. In the interests of maintaining the professional reputation of the Forest Research Institute no reports of that sort are ever released until they have been refereed. You did not mention that.

Guy Salmon

I take your point: in describing to you the circumstances of the report not being released I didn't explain why it was given the status of an internal report. However, I did allude to the fact that it was intended to be published in due course — quite possibly, as I indicated, after the forest has been logged. How important is the fact that that report had not been refereed? There was another report by the same scientist which was requested of the minister at a public meeting, and he agreed to release it. That was a non-refereed internal report, and it was released to us at the time. When it was subsequently published in the *New Zealand Journal of Forestry* there were no changes made to it as a result of the refereeing process. Had the other report also been released to us, in its unrefereed state, then what would the consequences have been? I suggest that if its findings had been substantially valid, then it would have stood the test of criticism from other scientists, and it would have been incorporated in the process of public debate leading up to the decision. Had it been an erroneous or sub-standard report, then scientific disagreement on it would also have become public currency. It really depends on the extent to which we are willing to place our faith in the ability of decision-makers and the general public to assess the standard and appropriateness of this kind of professional information. It is

significant that the Institute's new guidelines under the Official Information Act would apparently see such a report released, but with a disclaimer on it acknowledging that it had not been refereed, that it was not necessarily an authoritative scientific statement, and that it did not represent FRI policy. That is an appropriate and satisfactory way to approach the type of difficulty you have described. Moreover, it does bear repeating again that this report was quoted in the submission of an organisation that was arguing for continuance of logging in Whirinaki Forest. It seemed, on the face of it, to be a case of selective release of information rather than a responsible withholding of it.

Robin Cutler

You're accusing someone of having leaked the report? Do you have evidence to support that?

Guy Salmon

I have official correspondence in which the writer is unable to offer any explanation as to why the report was in the hands of this particular group, but considers that it had been released. That seems to me to be sufficient evidence, on the face of it, to indicate that an unsatisfactory discrimination was being practised. I was referred by the writer to the organisation that had obtained the report, and that is where the matter rested.

Peter Boag (State Services Commission)

I have a comment rather than a question. I spend a fair amount of my time trying to convince people that the television show *Yes, Minister* may be a documentary about the civil service in Great Britain, but it's not a documentary about the public service in New Zealand. I also spend a great deal of time convincing people that our public service is sincere about operating the Official Information Act. Nowhere in the programme for this convention does there seem to be a picture of what in fact is happening in New Zealand. We have been given an interesting description of the Australian experience, and this was picked up quite accurately in this morning's press. But it would lead the reader to believe that the same sort of resistance found in Australia is present in the minds of senior public servants in New Zealand. Unlike Australia, however, we started by training permanent heads, and we have moved downwards with the objective of training 87,000 public servants in operating the Official Information Act. The concern that I expressed to senior editors of the news media at a seminar we organised for them was that the operation of the Official Information Act was a two-way process — that the public had to agree that the public servant was sincere, and that the public servant had to operate the Act in letter and in spirit. I am sorry that this forestry case study has turned out to be a battle between one interest group and a government department. We have heard all sorts of allegations about conspiracy theories and what public servants are on about, and how they manipulate things, and I think that if interest groups and the news media want to kill the Official Information Act then that's the way to go about doing it — to perpetuate a feeling that the public servants are not sincere. Now you may read all sorts of things into what is published and not published, but as chairman of the officials committee which had the responsibility of setting up the Official Information Act, I can pledge that the public service *is* implementing it. The Act didn't have its genesis in 1975 — it had its genesis in 1964 when the government of the day and the State Services Commission announced that information would be made more freely available; and that line has been pursued since then. It has now been found necessary to put it into statute, and this will operate properly as a partnership between the public service and the community.

Len Fahy (Managing Director, Accident Compensation Corporation)

Representing quasi-governmental bodies, I would like to pay a compliment to the State Services Commission on the trouble that they have gone to in initiating planning for the implementation of this legislation. We in the ACC are fully prepared to meet the requirements of the Act in a fair and reasonable way, and to give it every support.

Tom McRae (Consultant, formerly of the Ministry of Works and Development)

Guy Salmon's arguments seem to suggest that our policy-making institutions are failing to identify the wider public interest. I think that NFAC, which seems quite happy to use secret information leaked to it, is in danger of becoming just another special interest group unless it speaks out against the inadequacies of the policy process in order to ensure that the system works more effectively.

Dallas Moore (Ministry of Works and Development)

It is always a delight to hear Guy Salmon. He will have noticed the way this convention has responded to his arguments. Public servants see themselves as a sincere, hardworking, uncorrupt lot, and it is always a shock to us to find that that isn't necessarily the way we come across to others. I think it's particularly valuable for us to be confronted with the fact that we do not appear to others as we know ourselves to be. And this distrust, as it were, is an important factor in the administrative environment in which we work. We must take it into account as we go about our business. It can develop in all sorts of minor, accidental, ways: and now I'm working up to a question for Alan Familton. You said that 52 percent of the Kaimai-Mamaku forest was not going to be logged. I'm sure that you didn't mean that 48 percent of the forest is going to be logged, but I'd like you to confirm it.

Alan Familton

Yes, I confirm it. We will only be doing a bit of thinning amongst the kauris, and otherwise only salvage logging of damaged trees.

Guy Salmon

I would like to comment on remarks made by the previous speakers. I did make it clear that NFAC is not in the business of using secret information that is improperly obtained. In regard to the suggestion that we are a special interest group, yes, we are. We have special interests; we are a part of a particular public constituency of the Forest Service; and we don't claim to be putting forward all kinds of general ideas. We are interested in the management of native forests. We do claim that there is a significant section of the New Zealand community which wishes us well, and supports us. There doesn't appear to be, except in one or two specific places, a substantial body of public opinion against us. The problem, therefore, is to try either to persuade the Forest Service to follow a more conservationist approach, or to have it over-ruled by its political masters on that issue. I appreciate that this leads to difficulties, which have been highlighted in my paper. But in discussing them, as here, one is seen to cast a shadow over the integrity of the public service, and to question its sincerity in implementing the Official Information Act. On the other hand, if one does not allude to these problems, then they will continue and the kind of distrust which has been generated in the past will persist.

I have been critical, but I've tried also to be reasonably constructive. I've suggested some changes to the Forests Act, which in my view would overcome many of the problems that I have alluded to, and would bring the Act into line with other pieces of legislation that already apply to agencies like the Town and Country Planning Division of the Ministry of Works and Development. I appreciate that there is a fine line here, and Peter Boag has drawn attention to it. If you portray to the public an image of government officials as being somewhat devious, then you tend to encourage that type of behaviour, or you make it acceptable. There are risks in doing that. On the other hand, if you don't draw attention to it, you don't get reforms. I have tried to strike a balance here. I'm not sure if I've succeeded, but that was my intention.

Alan Familton

I would like to pick Guy up on one point he has made. He has indicated that NFAC's major concern is management of native forests, but he argued that my particular profession — I am a forester — is basically interested in felling trees. That's a blatant simplification; it simply isn't true. Foresters are just as interested as NFAC in the management of indigenous forests. Part of the management process of those forests may involve logging trees. The argument is with the

extent of that logging. But let us not lose sight of the fact that New Zealand's indigenous forest resources require management, and that logging is not synonymous with forest management. It's one operation within that process.

Tom McRae

Just a brief reply. Guy Salmon, NFAC is essentially a reactive group. I don't deny that you have a wide public constituency, but you really do not address yourself to the broader policy process. If you were to devote a little time to that you would help to ease the burden of public servants, who are the intermediaries between the community and the politicians.

Chris Burns (State Services Commission)

The impression I've had from both speeches is that this is all very much a paper war. I was reminded of Kara Puketapu's comments earlier on about the Maori way of doing things, about how they have long meetings, and how they talk through their problems. Does that approach have any future in the forest sector?

Alan Familton

I most sincerely hope so.

Tony Loorparg (New Zealand Administrative Staff College)

How much do you do now along those lines? To what extent do you get together? Or is this the first meeting you've had?

Alan Familton

No, it's not the first meeting we've both been at. You see, Guy Salmon and other dedicated conservationists are only one sector of the public as far as we're concerned. They keep us on our toes; they are really important — they provide a sort of checking system on what we are trying to do with the nation's forests. But they represent a section of the public, not *the* public. There are other people out there for whom we have to cater.

Guy Salmon

I certainly accept that. What I do say, though, in regard to a number of the issues we have been debating, like the Kaimai-Mamaku forest, is that the only voice asking for the trees to be felled is that of the foresters. That, I think, is the problem. It is a group which is convinced that the forest needs to be managed. It is also a rather powerful group, and that is why we, as members of the general public, sometimes feel there is not much we can do about it.

David Baragwanath (barrister)

I am not sure I belong to any of the three groups Guy Salmon mentioned. I have just walked along the road from the Court of Appeal, where two very different stances were reconciled after the president suggested that we and our opponents ought to put our heads together within certain time limits. I'm not sure that either of the parties in this forestry discussion have really come to the crunch point, so to speak. The question is not whether information is disclosed or kept secret. It is whether specific information in particular circumstances is disclosed or not. I think the proposal that such matters ought to go to the ombudsmen's office and be tested there is very important to the proper working of this Act. Obviously, the parties are at issue — it's in the nature of the game if they're both doing their job — but I suspect that a lot of the hassle will fall away, as has happened in America, when the review processes are used.

Robert Gregory (convention chairman)

In drawing it to a close I would like to suggest that the discussion we've had over the last two hours really illustrates how the question of official information lies at the cutting edge of public administration. Dallas Moore mentioned earlier that we often appear to others differently from the way we see ourselves. I think that point is demonstrable in this case. The perspective of each side, towards itself and towards the other group, is shaped largely by the task that it sees itself fulfilling. However, the pertinent point about all this may be that while we are not what the other side thinks we are neither are we what we think ourselves to be. Perhaps this is one reason why a little less certainty in governmental administration is actually to be desired.

A Study in the Social Services: Health

Some Professional and Administrative Implications

Max Collins

As a medical man I am interested in the general theme of this convention: the Official Information Act, panacea or placebo? In nearly forty years of medical practice I have seen a number of so-called panaceas. The most important one, I suppose, arrived a little before that time — penicillin. It has been the nearest thing to an actual panacea, a cure-all. But it is not the final answer to all infections. It does not meet all needs. I have learned, too, the value of the placebo, where the best medicine that the doctor can give is himself, his care, compassion, and understanding, supported by some soothing or harmless drug. But again it may not work; some more potent remedy may be necessary. In looking at the Official Information Act I see it as neither a panacea nor a placebo. As the Institute rightly says in its convention brochure, it is a beginning. It will not satisfy the needs of all members of the public all the time; further moves will be expected in the release of information. Nor would I agree that the new legislation is simply a placebo intended to humour the public. It could be said that sections 6 - 9 of the Act provide reasons for withholding information on every occasion. But I think that's a slightly unfair assessment of the Act. Instead, we need to stress section 5, which establishes the principle of availability; we must emphasise the intention and spirit which lies behind the legislation. The Act is quite a significant change — much more than a placebo.

Having said that I should point out that the Health Department has always been prepared to release information. In fact, a statutory function under the Health Act is to publish reports, information and advice concerning public health. I believe we have always been readily available to the media, even if we feel that we have not been fairly treated at

Max Collins is Director of the Health Department's Division of Public Health.

times. My friends, of course, would claim I am too available. Certainly I learned early in my days in the department that a sure way for the then director-general to start a witch-hunt was for someone called "a departmental spokesman" to be quoted in the media. Public health is always of interest to the news media, and one of the real handicaps we face is that the carcinogen of the week is usually known to the media before the department.

I think we need to recognise and appreciate the vast amount of information that is available, and has been for a long time. There are the annual reports, which give a very good summary of all the department's yearly activities, together with a series of statistical tables; the publications of the National Health Statistics Centre, which provide mortality data, cancer data, and postneonatal mortality studies; studies undertaken by the Management Services Research Unit, such as the survey on physical disability. There are the reports issued under the Board of Health, like the Child Health Report — a major document last year; the five-yearly grading of local authority water supplies, and of refuse disposal sites; the report on special care services for the new-born. In addition, there are special reports commissioned by the minister, on the departmental computer programme, for example. Or on the safety of the poliomyelitis vaccine. Or an investigation of 245T and human birth defects, of the equitable distribution of finance to hospital boards — to name some of the more recent reports. I could go on at length, but will mention one further example, the regular and full reports of the National Radiation Laboratory — a departmental unit in Christchurch, which works in a most sensitive area.

All this, together with regular news media releases and appearances, and much educational and promotional material, adds up to a vast amount of information that is publicly available. This will not change, and already requests have been received — and I'm sure will continue to be received — under the Act for information that was available before the Act was introduced. Authority is given in the Act to refuse requests for information already or shortly to be publicly available. I suggest we need to emphasise the amount of information which has been and will continue to be available, and the regular means of obtaining that information without invoking the formal procedures under the Act.

I want next to discuss some of the information which the Health Department, and my division in particular, will normally withhold. As far as personal health matters are concerned, I should point out that the department holds very little such information. The most detailed would be that held by the Director of Mental Health on special patients, which is certainly confidential. There is some information held dealing specifically with infectious disease cases notified under the Health Act, but again this is confidential. Any suggestion that the department is the holder of a mine of clinical details about the whole population is quite false. I would also refer to section 27 (1) (d) (ii) of the Act, under which information on the physical or mental health of the person requesting it may be withheld, if it would be likely to prejudice the health of that person. I would point out that hospital boards are not covered under the Act, so that information held by the data processing division as agent

for the boards — for example, payroll or admission and discharge records — is not covered by the Act.

The Clinical Services Division holds a considerable amount of information on benefit payments, but this would seem to be of a personal nature, and may therefore be withheld. The division has already had a request from a member of the public wanting to know the number of confinements that a certain general practitioner has performed. The request was declined under section 9 (2) (a) in order to protect the privacy of natural persons. It was suggested the person could inquire of the practitioner himself if he wanted to know.

On the other hand, my division does hold a great deal of information collected from industry and retained in several branches. I refer to information collected in the process of licensing under the Clean Air Act; in the administration of the toxic substances and food legislation, including inventories of food manufacturing processes (this is obtained through commodity inspections); and material obtained by the Occupational Health Branch, through special surveys undertaken to identify potential hazards in industry.

I will refer in further detail to the information from industry obtained by the Occupational Health Branch, but some of that, and much of that which is held by the Air Pollution, Food and Toxicology branches would be withheld under both the Official Information Act and specific legislation. In the former case section 8 (1) (c) of the Official Information Act protects information relating to competitive commercial activities, or which is supplied in confidence to the department. This is something the department has guarded very carefully in the past and will continue to do so, as we do not wish to be a party to industrial espionage.

In addition, some of the public health division's information is withheld under section 18 (c) as it is protected specifically by the legislation under which it is obtained. The Clean Air Act, for example, provides that it is an offence to disclose information relating to any manufacturing process or trade secret, except under specified circumstances. It is interesting that through the years there has been a great deal of criticism that the air pollution control officers work too closely with industry in the licensing process, and in the setting of conditions to be met under those licences. The conditions laid down are detailed in the licence, and there is provision in the Clean Air Act for the director-general to allow licences to be viewed by the public. In spite of such criticism, however, this opportunity for inspection has rarely been used.

As far as the Food Act is concerned, the medical officer of health has power to obtain information, but again it is an offence for an officer to release knowledge gained in the performance of his or her official duties. Similarly, under the Toxic Substances Act, where the director of public health has authority to seek further information about any toxic substance to be imported or manufactured, it is required that this be kept confidential, except for the purpose of administering the Act and so on. (In looking more closely at the Toxic Substances Act I was interested to read that any such information supplied to me shall be in English.)

It is abundantly clear that my division is the repository of a large amount of information submitted or required from industry. I believe I can say that industry's confidence in the department's officers has not been misplaced. Fears have been expressed of the likely effects of the Official Information Act, but I am sure they are groundless. The information is protected not only by the Act, but by the specific legislation under which the material is obtained. In saying that I would like to emphasise my hope that there will be a further freeing up of information held by the department, but it can only be with industry's agreement.

I said earlier that I would refer in greater detail to information obtained by the Occupational Health Branch. This is an interesting case, because much of that information was gained by officers of my division under the Factories and Commercial Premises Act, and the release of information under that Act is much more restricted than we are used to in our department. We found this difficult for two reasons. First, because much of the information obtained by district office staff, or particularly by one of our regional occupational health teams, was gained in a survey initially requested by either the employer or the unions. We believe that the results should be available to both parties, and this should be explained beforehand. When the results are known we can sit down with both parties, and with the Department of Labour to work out how best to deal with any revealed situation. This is a procedure we have been using increasingly over the last four or five years. Secondly, we may obtain information in such a survey on the personal health of a worker, and it may be important that this should be made known to a limited group of people. We do not wish to have to go to the Minister of Labour every time we release some information about the health of a person, whether it is to his or her general practitioner or to other people who have a right to know. Thus in 1980, with the agreement of the Minister of Labour, the Employers' Federation and the Federation of Labour, the Minister of Health introduced an amendment to the Health Act which provided for inspections of factories to be undertaken not only under the Factories Act but also under the Health Act and other relevant legislation. This was not to increase the powers of entry for inspection, but to make better use of the information already obtainable. Similarly, in February of this year the division sent out a memo to all districts re-emphasising the point that occupational health investigations should be undertaken with the co-operation of both unions and employers, regardless of who initiated and requested the particular survey, and that this should be clearly understood before the investigation is carried out.

Let me now deal more specifically with the effects of the Official Information Act on the department. What has happened during the first few weeks of the Act's operation? If we were expecting an avalanche of requests then we've been disappointed. If we were fearful of such an avalanche then we are relieved. Particularly in the Food Branch, we were conscious of the shattering effect on the Food and Drug Administration in Washington of America's Freedom of Information Act. I am not surprised that the response in New Zealand has been different. As I have already indicated, the department's information policy has long been reasonably open. It is sobering to recognise that by 1977 the FDA was

receiving 2,000 requests per month under the Freedom of Information Act, requiring 66.5 man years to provide the responses at a cost of $2m per annum. Most of these requests are industry-related, 80 percent of them coming from attorneys and representatives of industry. Firms have been established solely to undertake such work, and one firm alone is initiating 20 percent of the requests. A log is maintained of all requests received, and this is open to the public. Industry spends a great deal of time studying the log to see what their rivals are requesting. To reduce the size of the queue there are now five copies available for inspection.

In a visit to the FDA in April of this year, I took the opportunity to discuss the freedom of information legislation and practice. I learned that the budget for these activities has reached $4m per annum. I also learned that all the FDA's work in this field was to be undertaken by existing staff, which sounds familiar. However, this proved to be impossible (which may also sound familiar), and now each bureau in the FDA has a staff of two or three to carry out this work. They deal mainly with the administrative procedures, being able to process only a minority of requests themselves, most of which have to be referred to professional or technical staff.

I believe this is a picture of the abuse of freedom of information, and trust we may be spared such a result in this country. Should a similar situation develop, however, I trust that the government and State Services Commission will be responsive to staffing needs.

Although I cannot speak with much authority because of the limited experience we have had with the operation of the Official Information Act, I can speak with some feeling on experience gained when the Minister of Health directed that the department should act as if the legislation were in force. It proved to be an occasion when much heat was generated, and when the light was revealed it proved to be good news so did not shine in the media for very long. I am reminded of the seminar on the Official Information Act run by the National Library Association in February this year, and which I attended. At this seminar Mr George Laking, the Chief Ombudsman, spoke of the tendency of people in this country not to be impressed by, or to remember for long, official information when it is released. Gossip picked up in Lambton Quay is much preferable. He said New Zealanders are not always concerned with, or do not react positively, to official information. One always has friends who are repositories of immense amounts of knowledge. Thus, when a great amount of information was provided, much of it new, and much of it previously considered very sensitive — on such issues as the Wanganui computer, the Security Intelligence Service and the import licensing system — the response was minimal and the debate and speculation soon died away. Mr Laking then added: "It will be interesting to observe what follows from the recent decision of the Minister of Health to open departmental files to the scrutiny of a newspaper".

Most of you will be aware of the scenario behind that event. Just before last Christmas a Member of Parliament called for a public inquiry into aspects of the use, over 20 years ago, of a type of poliomyelitis vaccine. This, he stated, would be the first real test of the Official Information Act,

although it was then not yet in force. The vaccine was said to be "contaminated". It had been used in 1961 and 1962, and when the matter had been first brought to the public's attention in 1974 the then Director-General of Health had stated that "uncontaminated" vaccine was not available in commercial quantities. The MP has now suggested that there was evidence to show that this was incorrect. On the day following the MP's statement, the Minister of Health and the Director-General both responded that there had never been any secrecy about the use of polio vaccine. Uninformed allegations had been made in 1974. These had been refuted, and at a press conference at that time the relevant papers had been made available to the news media.

I must divert at this point to offer some explanation of the use of the word "contaminated" in this context. The vaccine was not contaminated in the true sense of that word, which means that something foreign has been added either at production or after production. This was not the case. Nor was the vaccine "dirty", another word much beloved of the news media. The vaccine in its preparation included a second virus — the so-called Simian Virus (SV40) — and at that stage, the late 1950s and early 60s, there was no method of purification to remove the second virus. It is the possible effects of this second virus, SV40, which have been the subject of debate.

Some six weeks after the MP made his statement (that is, about the end of the traditional New Zealand holiday period) the issue was taken up in successive editions by *N.Z. Truth*. The allegations made then have been comprehensively investigated at the request of the minister, and the resulting two reports have been made public.[1] I don't intend here to make specific comments on the reports. They are of particular interest to me, because I was closely involved in the investigation both in 1974 and again this year. However, the department's experience in this episode is relevant to the topic of this convention.

The advisory committee which was set up to look into the question, and which was chaired by Professor Newell of the Wellington Clinical School, had a herculean task. The department speedily produced a mountain of paper covering events going back 25 years. There were 72 documents and 69 journal references. In addition, most members researched the events in terms of their own experience or that of the institution to which they were attached. All the committee members were non-departmental persons, either attached to hospitals or universities. In one or two cases they were in private practice. All this preparation culminated in two full meetings in Wellington, and when I say "full" I do not exaggerate. One went beyond the departure time for out-of-town members, who had to stay the night, adding to the expense of the exercise. Before the report finally went to the minister, a further two-and-a-half hours were spent checking the draft by telephone conference. On top of this, the impact on the staff was profound. In all, 43 staff members were involved, spending almost 2,000 hours over a period of about four weeks. For some of them involvement was relatively small: 13 spent less than 10 hours on it. Twenty, however, spent between 10 and 50 hours; three between 50 and 100 hours; and seven more than 100 hours, with a maximum by one person of 218 hours. I have no

record of what time the 18 district offices devoted to this exercise, but I certainly know that most of them had a considerable number of 'phone calls and much correspondence to answer. The two staff members who acted as the secretariat to the advisory committee carried the heaviest burden. Following the second, and longer, meeting of the committee they worked for 12 hours through the night to complete the draft report by the following morning, a Friday, so that it could be typed and sent to the chairman for him to review over the weekend. The report then had to be retyped on the Monday, sent to members around the country for them to review prior to the telephone conference on the Wednesday; then on to the Government Printer so that it could be delivered to the minister the following Monday.

I give you these details simply to indicate the cost in resources and the strain on staff which can be involved in "open government". Every case will have its special factors, but two points need to be made. First, while staff are engaged in an exercise of this sort they are not carrying out their assigned line duties. There is, as the economists say, an "opportunity cost" — the work *not* done. And, secondly, while the Act does not specify the time frame within which a response should be made the State Services Commission suggests that a week is reasonable. I am sure that it may well be in the majority of cases; but we need to be realistic about the pressures placed on staff involved in responding to requests. While we all recognise that publication deadlines are vital to the news media, we should not be too reluctant to say that some requests simply cannot be met in the time available.

Referring back to the vaccine exercise that I have outlined, the monetary costs were as follows. (The figures were calculated retrospectively and could well be under-estimated.) The cost for the advisory committee was $6,500 (fees, travel, tolls, secretarial, etc.); departmental salaries were $21,000; other departmental costs (tolls, air-freight, etc.), $2,000; and printing and photocopying, $5,000. A total of $34,500. What did it accomplish? For the record, I simply quote two extracts, one from each of the two reports, as summarised in the department's latest annual report.

> *"The reports were commissioned following allegations in newspaper articles of long-term harmful effects resulting from the presence of SV40 (an extraneous virus) in the vaccine and of possible administrative improprieties. The special committee reported that all available evidence showed that SV40 is not pathogenic (does not cause disease) to man. The State Services Commission review concluded that there was 'nothing which would suggest there had been any deliberate attempt to mislead the public of New Zealand or to cover up any of the decisions and actions taken — particularly in respect of the purchase of vaccines'. The reports of both investigations were made public."*

Apart from this, what are the implications in terms of the Official Information Act? The department when required to was able to respond in a full, speedy and satisfactory way to a very major request for information. I suggest, however, that several such requests would be more than

present resources could meet. The public now has the opportunity to obtain information not previously available, and although some must be withheld still, further relaxation will occur. The concern must be that departments will be overwhelmed, and hindered in carrying out their normal responsibilities. To avoid this, responsibility is also required on the public's part. Information for information's sake should not be sought, and emphasis should be placed on the requirement that requests must be specified with due particularity. If this means that the response to a request brings forth a further request, so be it, but the original request must be as precisely stated as possible. As an example, the request from a reporter for all that there is on the department's computer does not reflect due particularity. It was also refused on the grounds that much of the information was publicly available, the reporter being referred to the press conference given by the minister last year (which I understand the reporter had actually attended), when a full report was given. He was also referred to the report of a couple of years ago by the Auditor-General, and invited to come back with any particular questions. When I last inquired he had not reappeared. Other examples could be given, such as a union's request for everything since 1890 about the use and hazards of asbestos. Apart from the fact that the department was not established until 1900, this request is far too massive and general. We are discussing the scope of this request at present; we do not want to refuse it entirely, but we want to get some semblance of reasonableness about it. We have also received from a newspaper a series of questions about Agent Orange, the defoliant used during the Vietnam war. The paper has given us a deadline which I consider to be unreasonable; and we should say so.

There must be a sensible way to approach the Act. It should be the last resort. The Health Department has long been willing to provide information of a factual, explanatory and background nature. The new Act removes some inhibitions placed on us by the Official Secrets Act. I welcome it. But on all sides we will need time, experience, and understanding. An over-zealous use of the Act will, I suggest, tend to erect barriers where there should be none, and to slow down the movement to greater openness which was developing in any event, as an element of good administrative practice.

As I see it, the Act is intended to assist the process of good government. It is not an end in itself. My own task is to assist in the promotion and preservation of the public health. As in most areas of government the personnel resources of my division are constrained by staff ceilings, and I can ill afford to divert staff from their primary role to have them solely employed in implementing the Official Information Act. My retirement is not too far ahead. I enjoy my work immensely, and find great satisfaction in it. I wish that we could do more. Only the pressures caused by staff ceilings encourage me to look forward to retirement. I thus hope that the new dimension introduced by the Official Information Act will not in itself prove a burden. I believe, in fact, that there will be advantages for the public service as well as for the public in this new opportunity for openness, but I would not wish to see very professional and dedicated staff producing paper under the Official Information Act rather than contributing to the public health.

Reference

1. See **Report to the Minister of Health of the Special Committee to Investigate the Safety of Poliomyelitis Vaccines,** Wellington, Government Printer, March 1983; and **Administrative Review Following Newspaper Articles on Purchase of Poliomyelitis Vaccine in 1961/62,** State Services Commission, Wellington, March 1983.

The Practitioner's Requirements

Jeremy Hopkins

As a doctor I belong to a profession that has been very actively guarding information for more than 2,000 years. The main thrust of that activity has been directed at preserving total confidentiality of matters that we learn from our patients about themselves and their families. Our views on that aspect of confidentiality have scarcely changed, and I trust never will. However, we have tended to become a little carried away in guarding "our" medical information. For many years we wrote prescriptions in Latin, so that nobody knew whether they were receiving a panacea or a placebo. When Latin no longer remained fashionable some members of my profession maintained the facade by turning to the simple ruse of totally illegible handwriting. Nevertheless, unnecessary guarding of information by a doctor from his or her patient is slowly diminishing and a much more sensible relationship is developing. We have yet to develop this to the most satisfactory level of information transfer between patient and doctor. That level depends on many factors, not the least being the ability of the doctor to communicate the information, and the ability of the patient not only to assimilate it but also to understand and to use it. Such information is used by the patient not only to understand what is happening to him or her, but more significantly it helps patients to take some active part in developing the decisions which affect them. The degree to which patients can achieve this depends, of course, on their ability and their motivation.

In the modern world there is little virtue in keeping secrets for secrets' sake. With respect I would suggest that in your own field as public administrators you may have paralleled a little of what has happened in medicine. In our own way we have become over-protective of the knowledge we have, and so too I believe has the public service. This was demonstrated to me in a practical way not very long ago, when, following a meeting with an organisation within the ambit of this new Act, the Medical Association group requested from that organisation a copy of the minutes of the meeting. This initiated a response that caused the minutes to assume the proportions of the Crown Jewels. It finally took several letters and several phone calls, the letters becoming briefer each

Jeremy Hopkins is an orthopaedic surgeon in private practice, and a visiting surgeon at Wellington Hospital. He is also a former chairman of the New Zealand Medical Association.

day, before the minutes were finally forthcoming. I trust that the new Act and the thinking behind it will prevent the repetition of such occurrences.

It was suggested to me that I look at the Official Information Act from the point of view of the health professional who uses official information in the provision of services to patients and in transactions with other parts of the health system. This I will try to do, but I am sure you realise that the health system consists of a very broad spectrum of personnel and organisations. However, from the point of view of practising doctors, this new Act probably affects us most in our role as providers of information that is potentially official, that is, information that once passed on by us to a government agency, thus becomes official. In the schedules to the Act there are at least 16 major departments or organisations with which members of the medical profession and others in the health field have frequent interaction. This could be in the form of advice, or of reports on patients, and is quite apart from the ordinary certification and medical screening associated with employment. The Accident Compensation Corporation, the War Pensions Board, the Abortion Supervisory Committee, the Department of Social Welfare, and the Medical Research Council are some of these organisations.

This complex legislation should not much affect medical practitioners in their daily work. But it will have repercussions on the information the doctors make available to such departments or organisations within the ambit of the Act, and which subsequently may become disclosable under the legislation. What sort of information are we talking about? To begin with there is personal, medical or health information on an individual or his or her family. This may be related to the treatment of the individual, or it could be a personal health assessment, such as a pre-employment medical examination or an examination conducted as a regular part of conditions of employment. The other large area where personal medical information is transmitted is in doctors' relationships with organisations such as the ACC or the War Pensions Board. There is also information of a more general nature that is transmitted and received. Most of this relates to the Health Department, and to public health in particular.

In the main there is little problem in the health professional receiving or being able to obtain information of that nature from the department, as it is a regular function of the department to disseminate such information appropriately and regularly. Most of it is of a clinical or epidemiological nature. It is related, for example, to World Health Organisation output — information on drug actions, reactions and availability; information regarding poisons, maternal and anaesthetic mortality, immunisation programmes and the like. All this forms the major part of the department's regular and well constructed documentation which reaches all practising doctors and many others within the health service.

The consumer's — that is the patient's — information requirements relate primarily to that material which is transmitted in the doctor/patient or nurse/patient relationship. Most of this is received by the doctor or nurse from the department or other similar organisation. In the main this is freely and widely available.

Outside of the patient/doctor relationship the consumer will frequently wish to have information from an organisation such as the ACC, the War Pensions Board or the Department of Social Welfare. Some of this information may be of a personal nature, and if it is it is not always readily available from some sources. For example, in war pensions examinations an examiner is requested not to discuss the findings with the pensioner. The pensioner ultimately receives a decision from the War Pensions Board, and that decision is based on the examining doctor's report. Occasionally the pensioner may not agree with the findings. Prior to the Official Information Act coming into force the pensioner had the facility to request re-examination by another doctor if he was unhappy with the assessment. In my experience this has been a rare occurrence, and suggests that the information and opinion passed on to the Board is well constructed and fair. It also suggests that the War Pensions Board acts in a similar fashion. However, whether or not the dissatisfied will be accommodated by the possible release of more personal information under the new Act remains to be seen.

Personal information from the ACC to a claimant varies in detail, but I believe that most relevant personal information which the patient may require is ultimately available at some point under the system that the corporation uses. After all, the ACC has taken over the function of an open court of law, such as existed in common law claims prior to the advent of the Accident Compensation Act in 1974. Information of a medical nature which is provided ought to be truthful and unbiased, and should be arguable if necessary in open court. Because of this the quality of information that is received by the ACC in the form of disability assessment reporting, for example, should cause little problem if passed on in whole to a claimant. There are some areas where difficulties might occur, and I will refer to these later.

There is another important facet of the relationship between the Health Department and those practising in the health field. There are a large number of health professionals working outside of the department who have regular involvement with it by way of the many health services advisory committees. Some are appointed by the department to such committees, and others by their own organisations. As these professionals are normally working outside of the department, they are in effect consumers of information available from it. With such people working alongside and within the department there is a very significant consumer involvement in the workings of the official side of the health service. That involvement is largely designed to assist in investigative or clinical work, and sometimes in non-clinical negotiation. Therefore those at the workface know that what emerges from the department, particularly material of a clinical nature, is a product not only of the department but also of their own professional colleagues. This makes such information much more readily acceptable, and invests it with a degree of impartial authority which it would not otherwise have. As it is in a way more authoritative the necessity for further delving diminishes. To a degree such a system exists in other areas, particularly with the ACC.

Apart from making this information more authoritative, this system serves another function: it provides an outlet for the dissemination of

information on a much wider and perhaps more personal basis than if it were to be disseminated only by the department. These particular health professionals will report back to their organisations, or back to their colleagues, more intimately than would be possible through, say, a departmental publication.

There are areas, particularly in the public health field, where total disclosure of information is quite inappropriate. The Danks committee has noted that the premature disclosure, for example, of steps to be taken to contain an epidemic, could in some circumstances undermine the effectiveness of those actions. I — and I'm sure most of my colleagues as well — believe that most of this information must be tightly controlled in a professional and rational manner by the department. The rapidity of modern air travel provides a prime avenue for the invasion of this country by a serious, infectious, and contagious disease. Public safety would be seriously at risk if certain information regarding such an epidemic were to be released before control and further preventative measures were in place.

I have tried to visualise one or two other scenarios specifically affecting health workers where problems could arise if the new Act is not carefully implemented. To begin with there is the paediatrician. The health and welfare of children can at times become a very complicated matter involving many agencies. This is particularly so when children's health is affected by their home environment, their parents, or other factors not associated with "normal" disease or accident. I am thinking particularly of the circumstances that may pertain in a case involving the so-called "battered baby" syndrome, that is, child abuse. A child may be admitted to hospital with suspicious injuries; or it may be that a child has had a number of attendances for a series of, say, minor fractures. Today, the syndrome is well known to medical practitioners, and we are highly suspicious even when abuse appears to be only a remote possibility. It is initially a matter of examining the child, seeing what injuries are present, and working out how they could have come about. Our data then has to be married to the parents' explanation of the incident or incidents. There are occasions when suspicion may be high but when evidence is inconclusive. In such circumstances, the paediatrician or the orthopaedic surgeon may wish to involve a social welfare department social worker to undertake some quiet background investigation. This would be necessary before any more definitive action could be taken, such as involving the police. A quiet investigation like this may still generate notes on a case file, and possibly a letter or two by the social worker. The paediatrician may also communicate in writing to the social welfare offices. Once in the department's hands these communications become official information.

Although the child is unlikely to request his or her personal information, I would think that under the Act the parents or guardians would be able to request and obtain it. The information might prove that absolutely nothing untoward had happened in the home, and that there was no question of parental abuse. On the other hand, the situation could be highly suspicious but not sufficiently so to initiate more drastic measures (such as reporting to the police) other than keeping the child

under supervision by a social welfare agency. Inconclusive evidence if released to a parent could result in an efficient and well-trained social worker or paediatrician being subject to the laws of defamation. This has nearly happened in the past. Even if the health worker has acted in totally good faith, and in line with accepted practice, such an action might be initiated. Even if the legal action did not succeed, any trust that existed previously between the parties would be destroyed, and the ultimate sufferer would be the patient, that is, the child. This is an area where great care must be exercised by public administrators, as guardians of that sort of information. Otherwise a vital aspect of team health care may be jeopardised.

As an adjunct to this particular point I must say I find it intriguing that our law-makers continually give considerable regard to the maintenance of legal professional privilege. Maybe it's a reflection of the number of lawyers in Parliament; in any case, they have indeed done so in the Official Information Act. On the other hand, however, doctors and other health professionals, working under similar ethical rules of confidentiality, receive no such protection, and to my knowledge never have. I note that under section 27 of the Act one of the reasons for refusing requests for personal information is that disclosure would breach a promise made to the person who supplied it, to the effect that the information or that person's identity would be held in confidence. But this only applies to information which is evaluative material, defined as opinion material compiled solely for purposes of assessing suitability for employment, appointment to office, for promotion, for the awarding of contracts, etc. I trust that in managing this Act public administrators will somehow be able to protect the work of people such as the paediatrician and the social worker in the circumstances I have outlined.

As an orthopaedic surgeon I am often called upon to report on physical disability to agencies such as the ACC, the War Pensions Board, and the education and social welfare departments. If I am asked to do this on a person who is a patient under my care, I cannot and will not do so without the written permission of that patient. Even so, what I have then transmitted to one of these organisations could very likely be retrieved from that organisation by the patient at his or her request. I am not saying that this is likely to be a serious problem, because in the main such communications are factual, and I'm sure most doctors carry out that particular duty conscientiously. The situation could arise, however, when the doctor is imprudent enough to be rather more frank than perhaps he or she ought to be in describing one or two of the patient's shortcomings. Whether or not the information the doctor provides is true is not the point, but with the advent of this Act it would be wise for a doctor in such circumstances to avoid including gratuitous comment. I well remember a senior colleague, now long dead, giving me a bit of advice when I began practice some years ago. He said: "If you're reporting to anybody about one of your own patients, if you cannot say something nice, then don't say anything at all". That is very wise counsel. But situations will arise where a doctor will be asked to provide information on a patient about whom the doctor finds he cannot say "something nice". In those circumstances a prudent doctor would refrain from

making any report at all, and would suggest that a report be obtained from an independent medical practitioner.

The matter is a little different when, for example, an orthopaedic surgeon is carrying out, on behalf of an agency or body such as the ACC, a disability assessment of a patient who is a total stranger. In those circumstances the corporation and the doctor have the contractual relationship, not the patient and the doctor. Such information, of course, does become official once it is in the hands of the agency. Indeed, it could be argued that it becomes official before it reaches the organisation if the doctor is considered to be an independent contractor engaged by the agency. As I said earlier, however, if a doctor produces a report of that kind in the knowledge that he should if necessary be able to defend his opinion in an open forum, as used to take place in the days of common law, then there should be few problems.

The team management of disability, physical or mental, in children and the elderly requires many others apart from the doctor to provide reports for organisations such as the education and social welfare departments. No such report would be based on malice, but at times the naked truth may well be unpalatable to the parent, if it's about a child, and could cause considerable distress. The comments may not be defamatory, but as I have mentioned, health workers cannot plead legal privilege. In these circumstances considerable prudence will be needed in the application of the Official Information Act.

Other difficulties could arise in industrial medicine. Both industrial medical officers and industrial nurses are at times employed by government departments and organisations within the meaning of the Act. Quite apart from their preventative health duties they are called upon actively to treat workers, who thus become their patients in the medical and nursing sense. Proper records must then be kept, and these may also contain correspondence from other health workers regarding resolution of the patient's problem. Such records presumably become official information of a personal nature, which will be protected on the grounds of individual privacy. While these written records will often be innocuous, their contents could be misinterpreted by the patient if sighted on request. And this too could cause distress.

I am not suggesting that simple medical information should be kept from the patient by using whatever means exists under the Act. But I am suggesting that such information must be provided in a way that ensures the recipient understands its proper meaning. In part this must obviously be the task of the health professionals involved, but I believe it will also fall upon administrators to make decisions in this area. For health professionals to have to think carefully about what they write and how they write it is no bad thing. However, information without proper explanation can often be misleading.

There are other areas where problems might conceivably arise. For example, I note that the Medical Research Council is named in the Act. Does this mean that a researcher in applying for a research grant can request and obtain detailed information presented to the council by another researcher? Bear in mind that there are competitive elements in-

volved in the granting of research funds although the workings of the MRC are quite open and do not involve any dark secrets.

Another committee — the Anaesthetic Mortality Review Committee — is not specifically named in the Act, and I trust does not come within its ambit. This committee reviews anaesthetic deaths in New Zealand. It does so in a totally confidential manner, since its function is not punitive but educative. Its reporting is done anonymously in a manner which ensures that the place where the unhappy circumstances took place cannot be identified. In any event, anaesthetic deaths are always investigated in the coroner's court. However, the committee has access to a considerable amount of information which may not be relevant in a coroner's hearing, and which if it were to become public knowledge could destroy the committee's educative function.

Health matters always make good copy for the news media, and while we would all agree that in a modern society education on relevant matters is probably the most significant factor in maintaining public health, in my experience the actions of some sections of the news media leave something to be desired. "Trial by media" in my view has absolutely no place in the health field. Irresponsible or uncontrolled use by the news media of medical information only serves to confuse, to promote unnecessary hysteria, and to give credence to matters which are beyond the fringe. Because these actions affect people's health I think great caution will be needed in the dissemination of some types of information.

I have tried to suggest here how the person at the workface in the health field might be thinking in regard to this Act. I'm sure public administrators will have to deal with some degree of voyeurism in the early stages of their management of it. However, I take heart in my long held view that those who work in the New Zealand public service maintain extremely high standards of practice and integrity, and that those who head our government agencies show considerable wisdom (which at times some of us outside may misinterpret). In the health field I believe there has been for a long time a considerable degree of information transmission in both directions between official organisations and health workers. I doubt whether any of us can yet say whether the Official Information Act will prove to be a panacea or a placebo, but in conclusion I might give you some brief medical advice: having swallowed the pill keep a watchful eye out for adverse reactions and side effects, and if you do find any report them promptly. Otherwise you may discover that you have had not so much a pill but rather a suppository.

Discussion (of both papers)

Ian Miller (State Services Commission)

I would like to clarify a point about the response time for dealing with requests for official information. Unlike the American and Australian legislation the New Zealand Act sets no time limit. However, the State Services Commission considered it would be appropriate to have a guideline that departments and organisations could work to, and accordingly it issued the following statement: *"The Act requires that a decision be taken 'as soon as reasonably practicable' whether a request is to be granted, what manner and what charge*

if any is to be made. It is recommended that departments and organisations aim for at the maximum a 7 day turn-around period in giving information or alternatively in sending an explanatory letter indicating the likely response time". The point that I want to make here is that people are missing out the last part of that statement. We believe it is a matter of courtesy: a person making an inquiry is entitled to know that the request has been received and is being actioned, and that there is a foreseeable date for a response. One other point which came out of the last speaker's talk was the question of defamation in the event of the release of information that has been supplied to a department and constitutes an official record. There is protection in the Act against defamation actions, but the question is how far does that protection extend? As I understand it the protection is for the department or organisation which releases the information, but it does not extend to people who subsequently publish it after it has been released.

Richard Featherstone (Health Department)

My question is for Max Collins. There has been discussion about the release of draft scientific papers before they have been refereed, or have been the subject of peer review. Can you tell us what the department's attitude is to the release of such documents?

Max Collins

As far as the department is concerned, no release would be made without the consent of the director-general, which is normally delegated to director level. As far as scientific worth is concerned, I can only quote my own experience in giving such approval. I would certainly ask for certain matters to be looked into further or re-written, if this seemed to be required. If the paper were on a topic that I was not sufficiently familiar with I would make sure that someone in the department had a look at it to ensure that it was acceptable as a scientific paper. We do take some precautions, and on the whole we would be able to support most papers issued by departmental officers.

Patrick Millen (Secretary of the Cabinet)

Just to clarify a point made by Jeremy Hopkins, section 27 (1) (c) of the Act deals with protection given to evaluative material. I got the impression from what you were saying that you felt there was too much doubt in this area as to whether there could be proper protection for evaluative material of a medical kind, particularly as the Act doesn't expressly protect patient/doctor privilege.

Jeremy Hopkins

That was the point I was trying to make. Legal privileges in many situations are spelled out, but medical privileges are not.

John Pohl (Ministry of Energy)

As a lawyer I can't help but make a comment on that particular point. There is a distinction, of course, between legal professional privilege and the medical privilege you're claiming. In the solicitor/client relationship, the privilege is that of the client. The client receives the advice and he may or may not waive the privilege that he has. In the case of information that the medical practitioner has supplied, say to the ACC, the patient is being protected from receiving information. It's the opposite of that applying in the legal situation.

Jeremy Hopkins

I would accept that; but it's the doctor who receives from official bodies requests for information about a patient. In certain circumstances he or she is obliged to give that, even if the patient says, "No, I don't want it known".

John Pohl

I agree that there's a distinction there, but it's the client in the solicitor/client relationship who has the benefit of the advice. In the doctor/patient relationship it may well be that the patient is ignorant, and the doctor is protecting him or her from the information.

Jeremy Hopkins

I am looking at it from the other way around.

Syd Holm (State Services Commission)

Max Collins, you mentioned that hospital boards are not, of course, covered by the Act. Do you think they should be?

Max Collins

I was surprised when I saw that they were not. I suppose that means I think they ought to be.

Patrick Millen

The reason is very simple. Any organisation which isn't of nationwide significance is not included. No local authorities are. Otherwise the schedule to the Act would be gargantuan.

Max Collins

The interesting development will be if and when area health boards are established, and district offices of the health department become a part of those.

Jeremy Hopkins

My own thought would be that for heaven's sake see what happens on the national scene first. The other point is that hospital boards are subject to parish pump politics rather than national politics, and I suspect that if they were subject to the Act their officers would spend even more time than Max Collins' people in providing answers to all sorts of bizarre requests.

Chris Reid (Health Department)

I understand that because the SV40 exercise occurred before the Act came into force the department in effect provided more information, and bent over backwards more than it would now under the Official Information Act. Also, at that stage the department was operating without some of the guidelines which are contained in the Act. One of these is about costs. I understand that in the very early stages of the SV40 inquiry it was obvious that it was going to involve a lot of time and manpower. Now we have an explicit directive from cabinet about costs and so on.

Max Collins

I suppose we did bend over backwards. I think it was important that we did, because it was a rehash of a pretty thorough investigation in 1974. In addition our integrity was questioned, so I suppose we were somewhat over-zealous. For example, no departmental people were a part of the committee, even though it was a normal, on-going, committee on which there were normally departmental representatives. The departmental staff were available to assist the committee.

Arthur Davis (State Services Commission)

One matter which concerns me, and also involves medical practitioners, is the possible withholding of information. I am referring here to section 27 (1) (d), where there may be information on a personal file which could have an adverse effect on the physical or mental health of that person. I wonder how a medical practitioner might go about deciding in a case where the department wishes to know whether or not disclosure would be likely to prejudice the person's health. For instance, would another examination of that person be required, and what degree of background information would be needed to make that sort of judgement? Also, it need not just be medical information on the file that could have this possible reaction.

Jeremy Hopkins

It depends to whom you direct the question. If you direct it to the patient's own medical practitioner, presumably he has a fairly good knowledge of that particular patient. I really think it's most likely to apply to the mental health of the patient. I can envisage very few instances, if any, where the patient is suddenly going to collapse, or have a coronary or something, on hearing what

is on his or her personal medical file. But that file could contain an assessment of some mental aspects of the person's problems, which if they were communicated to the patient in the manner shown on the record could drive that person away from his or her psychiatrist or doctor, or have some effect like that.

Max Collins

I think I would have to agree with that. I think this section of the Act has been included as a sort of ultra-protection. It goes against the increasing development of more frankness with patients, for one thing. The profession is constantly being encouraged to be more frank and open with patients, particularly those with serious illness, and this is happening. But the doctor still has to judge under ordinary circumstances how much information it is wise to put to a patient. I would certainly think that consultation with a person's general practitioner would be important before a decision is made under that sub-section, which I don't think will be invoked very frequently.

Jeff Connell (Ministry of Transport)

I would like to comment on two issues. One is about defamation and the other is about a medical matter. As Ian Miller said, there is reference in the Act to defamation, but it's a very restricted provision. Defamation isn't defamation until it's published. If I harbour evil thoughts about someone I haven't defamed them until I've uttered those thoughts. All the Act says is that if the publication is one compelled under the Act then a person who is so compelled cannot be sued; but, of course, the thought or the document that is published may have been lying around on departmental files for many years, where it has been seen by many people and therefore published to them. And that publication may be the subject of an action. Public officials are in various categories of privileged positions as regards the law of defamation. For example, if one of the Ministry of Transport's superintendents of mercantile marine makes a report about a yacht casualty, and happens to cast aspersions on the conduct of the master, then the newspaper that subsequently publishes that report is absolutely protected. Unless it can be shown that the superintendent was activated by malice he is protected too. So you can't wrap the law of defamation up in one sentence as it affects public officials.

Moving on to the medical matter, I would like to support something Jeremy Hopkins said about reports being provided to departments by medical practitioners in private practice. The Ministry of Transport receives quite a lot of this sort of information — for example, on applicants for drivers' and pilots' licences and so on. It has long been established as part of the common law of New Zealand that when information is provided to a department to enable it to exercise a statutory power of decision, then the requirements of natural justice insist that that information must be made available to the subject of comment. I give you an example of a case decided in the Court of Appeal some years ago, where the person concerned had applied for a permit to stay in New Zealand. The permit was initially refused, but the matter was reopened again on the grounds that the person had a child who suffered from a kidney problem which required very close medical supervision. That was available in New Zealand but not in the islands where this person originated. There were conflicting medical opinions on the extent to which the problem could be treated in the islands, and the Court of Appeal made it plain that before the immigration division of the Department of Labour could decide whether or not to allow this person to have a permit they had to give that person an opportunity to see the medical opinion that went against that person's interests. In the Ministry of Transport we make it plain to the medical practitioners from whom we seek reports in regard to driver and pilot licensing that these reports are not given to us in confidence, in the sense that they may at any time be supplied to the patient, at the patient's request. So even though strictly speaking the report is sought by the Ministry of Transport and provided by the general practitioner to the ministry pursuant to contract, nevertheless we cannot hold that report in confidence, because of the requirements of natural justice. It has very little to do with the Official Information Act.

Jeremy Hopkins

Your department works very well in warning practitioners that this is the case. Doctors tend to believe that what they say in their reports will not be read by anyone except the persons to whom they send them. This, of course, is nonsense. They also believe that if they say they don't want the patient to see it, then it won't be seen by the patient. This also is nonsense. There are many organisations which don't give the simple advice that your department obviously gives. As far as defamation action is concerned, it doesn't have to go to that extent. The rapport that there may be between the patient and his relatives, and not only the doctor or the social worker but the hospital as a whole could be destroyed if some obviously frank information which has to be discussed between parties is disclosed. The main point is that in the child abuse situation I was talking about the only one who is going to suffer is the child.

Warren Page (*The Evening Post*)

As a journalist I am somewhat concerned at the reference that has been made to the apportionment of cost in the conduct of an inquiry. I am concerned, first of all, that it may discourage some small newspaper or some private person from initiating an inquiry, particularly one that promises to be complex. Secondly, I am concerned that a department may be over-zealous — that's the term used by Max Collins — in pursuing a particular inquiry and may load the cost on to a private individual or, again, a small newspaper. And thirdly, having completed an inquiry a department may decide to deter that kind of inquiry again by insisting that the costs be paid by the inquirer.

Max Collins

I hope that we won't have many inquiries like the one I have described. I think most will be relatively small, and there will be no, or only a small, charge. I don't think it would normally be a deterrent. We have in one case responded by indicating the number of hours and the costs likely to be involved, not to deter the inquirer but to try to have the request made more reasonable.

Ian Miller (State Services Commission)

There is certainly no limit on the total amount of liability, but there are two protections that should be emphasised. First, a commission guideline provides that if there are going to be costs incurred then the applicant should be told before the work proceeds, and given an estimate of the likely sum involved. Secondly, if not satisfied with this advice from the department, under the Act the applicant can have the matter reviewed by the ombudsmen. Also, cabinet has determined that costs can be waived or reduced if an inquiry is considered, generally speaking, to be of wider public interest.

Informing the Backbench

Garry Knapp

I was asked to give a Parliamentary backbencher's point of view on the Official Information Act. So to begin with I should mention that there are in the Act several main deficiencies which are of particular concern to some members of Parliament, as indeed they are to many other people in the community. These shortcomings are: the broad field for exemptions covered in Part 1; the lack of a time limit and its implications for almost indefinite delay in the release of information; the lack of an independent judicial review procedure; and the failure to repeal the myriad prohibitions against the release of information contained in other legislation. In addition, logistical problems are already cropping up in implementing the Act's provisions.

I introduced a Bill to the House in August that dealt with access to information. It called for The Treasury — the most powerful department in our system — to make an annual report to Parliament. I was unsuccessful in persuading the Prime Minister and his colleagues that they should see that this sensible action is taken, as it is in Australia and other legislatures. During that debate the Prime Minister confided to the House that concern had been expressed by The Treasury at the volume of work already generated by requests made under the Official Information Act. This makes the implications of a lack of a time limit on the supplying of information even more significant.

The principle of availability stated in section 5 is fine in theory, but we will have to wait and see if the spirit of the Act is nullified by undue refuge behind reasons for withholding information. Unfortunately, Part 1 provides many opportunities for opting out unless administrators consciously adopt a positive attitude. The Act's somewhat timid, gradualist, approach must not be used as a smoke-screen to hide a lack of commitment to real change in our traditional "need to know" stance — secrecy for its own sake more often than not. Legislation by itself will not provide open government. The best intentioned laws can still fall foul of legalistic niceties, inadequate resources, or just sheer obstructionism.

The latter is something we run into in Parliament all the time. Many questions in the House, particularly if they are relevant, run into ob-

Garry Knapp is Member of Parliament for East Coast Bays, and Deputy Leader of the Social Credit Political Party.

structionist attitudes. There is no effort by government to disclose information that it chooses not to disclose. It holds the initiative and can therefore effectively block the disclosure of information. Parliament no longer has, and has not had for many years, adequate information and thus effective power to perform its function of making the executive accountable. It is ironical that official information legislation should have been debated and passed by a Parliament whose own work and effectiveness is seriously hampered by the inaccessibility of much relevant information to non-cabinet members of the legislature. Parliament is the supreme decision-making body. Our respect for its authority stems from the basic premise that it comprises elected members who collectively represent the view of the people; the majority view being that which prevails. Unfortunately, the myth of parliamentary supremacy is firmly entrenched in our political psyche, and tends to blind us to the realities of our antiquated and rather unique form of parliamentary democracy. (Incidentally, it has been said that the nearest constitutional structure to New Zealand's is that of the Republic of South Africa. I find that analogy interesting.)

Because of New Zealand's electoral system, the last 10 elections have delivered minority governments, meaning that the party which has formed the government has not had an absolute majority of the total vote. These governments have therefore reflected minority viewpoints. Defenders of our so-called Westminster model of democracy claim that the government caucus acts as a restraint on executive power. That argument has been wheeled out a great deal recently. As the iniquities of the present system have started to come home to people who have a conscience about how the system works, they have come to argue that caucus — a body, by the way, that works in absolute secrecy — provides a check on executive power in the Westminster system. But, of course, the New Zealand situation can hardly be compared with that in Britain. When the British Prime Minister reports with her cabinet to caucus she faces quite a significant test. Proportionately, her caucus far out-numbers the members of cabinet, and the sheer weight of numbers ensures that caucus *can* act as a restraint on executive power. Compare that with the normal New Zealand situation: our government caucus presently numbers 47, 22 of whom have a commitment to cabinet. In this situation, where members of the executive almost equal the number of backbenchers, and given the principle of collective cabinet decision-making and secrecy, the caucus really has little power to effect change in actions predetermined by cabinet. In short, a *fait accompli* is achieved where the partisan nature of party politics will ultimately prevail, notwithstanding the fact that when there is, as now, a finer balance in Parliament an individual backbencher can exercise a lot more power in caucus.

The main function of our government is to manage the economy, and the main function of Parliament is to ensure that the executive and its bureaucratic arm are kept publicly accountable. Recent statements by the Prime Minister that, because of our "simple" system his government has wide-ranging powers enabling it to legislate quickly and effectively, and that a three-yearly election is a sufficient check on a government's performance, are disturbing in the extreme. The essence of what he is saying is that the system is good because we get powerful government

from it — powerful government that represents a minority point of view, and with no check at all on it. (I like to point out to some of the National Party people in my electorate that the very same power that is used to entrench the National government's position and to protect its supporters' interests, is the same power that will be used to strip them away. That usually shakes them up a bit.)

Parliament should at least reflect the will of the people, and become more responsive to public opinion. A government which arrogates all decision-making to itself with little or no effective means of controlling the executive is one which becomes arrogant and elitist, not because of personalities but as a result of the system itself. Parliamentary democracy can function adequately only if the people and their elected representatives are fully informed. The mistrust of government felt by so many citizens stems from the very real fact that so many decisions are made in secret — a state of affairs which affords the executive a quieter life. My mistrust of the government is sheeted home to the same concern: I have said time and time again in debates in the House that if government were to be more free with its information then it may be surprised to discover that some of the opposition members, and certainly myself, would find a lot more to agree with because we would be less suspicious.

The Official Information Act has as much bite as a gummy sheep so long as innumerable prohibitions against disclosure of information are retained in other pieces of legislation. I would go so far as to assert, moreover, that this Act is of more relevance to ordinary citizens than to members of Parliament. Parliament itself is outside the scope of the Act, and I would question the necessity for MPs to have to use the Act to pursue required information as private citizens. Surely as the elected representatives of the people parliamentarians should as of right have access to information which will enable them to do their job properly. Most of us, strangely enough, are quite responsible people. We do get access to some information. I sometimes doubt how sensitive it is, but we often are very sensitive in using it. It concerns me greatly that when a matter like the poliomyelitis vaccine issue comes up, if I want to obtain accurate information I am forced to resort to this Act, only to find that I haven't got as much confidence in these procedures as in those open to me in the House. Either way I still don't receive the information.

If no automatic means exist for having access to advice to government, and government's response to that advice, how can informed debate — which is the prime function and mode of operation of Parliament — take place? Put yourselves in my position. If you wish to debate an issue, if you are genuinely and deeply concerned about an issue, and you want to act in the best interests of the people you represent, it is enormously frustrating and quite worrying to feel that you really don't have all the facts. I don't believe that proper debate can take place in Parliament.

In this context it is valid to consider whether the manner in which Parliament operates, and the way in which the rules are applied, don't preclude the effective use of information, even supposing it were freely available. Parliament operates within a straight-jacket imposed by the governing party. A backbencher is prevented from producing legislation which requires the expenditure of public money. This effectively en-

trenches the executive's dominance. He or she may ask ministers any number of questions, but particularly in the financial area informative replies are too often denied by invoking the word "confidentiality". A questioner is told that to disclose the information requested would — to use the words of section 8 (1) (a) of the Act — "prejudice significantly the competitive commercial activities of the Crown"; or would disadvantage commercial interests who had supplied information in confidence to the Crown. I would agree that there is sometimes a case for temporarily prohibiting disclosure of financial details of commercially sensitive negotiations. But the wide-ranging and ambiguous wording of Part 1 of the Act in particular is far too broad and general. Phrases like "to prejudice", "premature", and "good reason" are open to a variety of interpretations and are all-encompassing.

Our democratic processes can only function adequately if the people of this country and their elected representatives are fully informed. I suppose you have become tired of hearing that, but it's a fact that has to be stated and restated. Nobody can properly evaluate the pros and cons of any particular governmental course of action if vital, relevant, financial data is not known. After all, government is not obliged to safeguard commercial interests against the interests of its citizens. If something is "in the public interest" — that most convenient of phrases used throughout the Act — and those responsible are confident that their judgement is correct, then why not stand by that judgement and open things up so that others will be forced to agree? Excessive secrecy can imply either incompetence, stupidity, or dishonesty. Surely it would be better to let the public judge? And the more informed the public is the better will be the judgement. And besides, running the risk of being seen as having something to hide is something that governments should strenuously avoid. Those in the know come to feel that they alone are in a position to judge what is right and good for the rest of us.

Although I have been asked to speak from the perspective of an ordinary backbencher, I would like to make the point that the position of a third party opposition backbencher is even less advantageous. I mention this because the rules of the New Zealand Parliament are formulated to have regard only to a governing party and an opposition party. They make no allowance for the representation of other viewpoints. The Leader of the (Labour) Opposition, for instance, has a personal staff, including the services of a seconded Treasury economist if required, whereas the third party — which is also expected to be able to debate everything coming before the House — has nothing like those services. Think about this for a moment: I represent 30,000 people in East Coast Bays, the biggest electorate in the last election. I am expected to have an opinion on every piece of legislation that comes before the House, but I am one of the few people in Parliament who are expected to formulate that opinion virtually unaided. I am bound to say that the Legislative Department, and the Speaker of the House, do try to accommodate a presence which is not specifically catered for under standing orders. But it is nevertheless an additional burden to work under.

The select committee which is convened from time to time to review standing orders, like all select committees of the House, has a majority

of government members. The 1979 Select Committee on Standing Orders (on which, incidentally, Social Credit was denied representation by a majority vote in the House) made one recommendation which was hailed as significant at the time. That was the requirement to refer to select committees for scrutiny all legislation coming before Parliament. That was indeed a potentially significant recommendation — providing as it did for the machinery for more effective deliberation on important legislation. But in practice it is something of a paper tiger, for two reasons. Firstly, because the permanent government majority on all select committees ensures that the government's view prevails in the final recommendations reported back to the House, especially on anything which is in the slightest way controversial or politically sensitive. (Some people say kind things about the select committee system. The only thing I would say is that while it has got some good points, it is really just a reflection of the image of the House. So the most important thing any MP can do is to work for the restoration of Parliament as an effective working chamber with power to control the executive.) The second point is that it is this very legislation which is often rushed through, leaving the select committee members — in common with other members in the House — with little opportunity to digest the mass of information presented to them in a short space of time. And that is also assuming that interested groups and members of the public have had sufficient time themselves to prepare submissions and put them before the select committees.

What I'm saying is this: it sounds fine in principle to have a system where proposed legislation is scrutinised, where information is available from officials, and where proposals can be considered fully before being reported back to the House. But if government wants something rushed through then members are no better off in the select committee than they are in the debating chamber. On many occasions I have heard people come before the Statutes Revision Committee and complain in their opening paragraph they were not given sufficient time to prepare their submissions.

The situation clearly makes a mockery of the principles on which the Official Information Act is based. There is little point in having access to information which will assist in making an informed decision on proposed legislation when that legislation is introduced to the House unannounced, and with no opportunity for opposition members — or, indeed, government backbenchers — to be able to form a considered opinion beforehand. And then to have that same legislation rushed through the select committee stage and back into the House for its final rubber-stamping before it becomes law is equally ridiculous.

Not all legislation is treated with such haste, but even in cases where Bills are before a select committee for a reasonable period of time, the one factor which outweighs all others is that the government majority, backed up by strict party discipline in an atmosphere of adversary politics, makes even the most critical government backbencher reluctant to provide information that might be used by his party's political opponents. My own experience of select committee work impels me to concede that much valuable scrutiny of pending legislation can be achieved, and that many Bills emerge from committee consideration substantially amended,

or are occasionally abandoned altogether. But that doesn't alter the fact that the availability of enough relevant information on any given matter, and sufficient time to enable informed discussion, are essential for the formation of a genuine opinion on a subject. There might then be less readiness on the part of all MPs to adopt rigid and narrow ideological stances, and more willingness to arrive at consensus decisions. Parliament would then be less a creature of the executive.

The most important area of Parliamentary concern by far — because it has ramifications which extend to all other sectors of our national life — is the economy. However, section 6 (d) of the Official Information Act effectively enables the government of the day to continue to keep secret much relevant financial information, such as the real level of overseas borrowing. The public and the opposition members of the House will continue to be told only the approximate amount the government has been borrowing overseas. As I mentioned earlier, the most powerful department of state, and the most secretive — The Treasury — unlike all other government departments makes no formal report to Parliament. But for Parliament to debate effectively there must be economic information available in a form which is capable of being assimilated relatively quickly.

The Official Information Act is welcome provided it can be used properly. But in many ways its intention is thwarted by the way in which the Parliamentary system operates. The Public Expenditure Committee — often described as "powerful". in that it can question departmental officials and elicit information from them — in reality is just as hamstrung in obtaining economic information as any other committee, because ministers have the final say on what their officials are permitted to divulge. As a matter of interest, the Public Expenditure Committee has not been able to speak to the Secretary to the Treasury, the permanent head of that department. Moreover, the committee itself — for no apparent good reason — operates in secret.

Another aspect of Parliamentary procedure that makes a mockery of the executive's financial accountability is the practice of debating departmental estimates of expenditure during the year to which they apply. The annual budget statement, which precedes introduction of the government's Appropriation Bill, in recent years has not been presented until some months into the financial year. This is followed by the budget debate, which takes some three weeks or so (and is something of a time-wasting exercise), so Parliament does not get down to debating individual departmental estimates until often a third of the financial year has already passed. In other words, Parliament is effectively giving retrospective approval to a significant proportion of government expenditure. The procedure of debating estimates which have already been a third or more spent makes a nonsense of obtaining information with which to debate effectively. It is a farce.

In conclusion, I would like to comment on the implications of the silicon chip and the design revolution for our system of government and methods of disseminating information. The ideal of participatory democracy has become more widely advocated in recent years, in the face of increasing political alienation: and its implementation in our more

sophisticated technological age has become more practicable. Low levels of political participation are inextricably linked with social iniquities. Alienated citizens tend to opt out of the system, or are too busy trying to maintain subsistence levels of living to perceive politics as having any real relevance. To maintain even a semblance of democracy we have to encourage more active participation by the people in their political system. This will only happen if people are more informed, so that they are able to formulate educated opinions on vital questions. The rapid advance in technology now makes it possible to disseminate information and seek opinion at mass levels. But the central question is, of course, the formulation and control of the information output. The new technology can be a force for positive good, in that it can facilitate increased citizen participation. But it can also become an instrument of increased centralism, secrecy and elitism.

The central questions of overall social and economic policy must be left to government, which must be kept accountable. This is achieved by the traditional elective means, but to prevent an "elected dictatorship" — a term in increasing use — this must be backed up by other checks and balances. That is why it is critically important to return power to Parliament as the final arbiter. The Official Information Act is certainly a step in the right direction, but it is a very small and hesitant one. We can only hope that as experience of its operation increases, public opinion will force more positive measures, and that the entrenched vested interests against change for their part will come to appreciate the benefits of a more informed populace, enabling consensus decision-making to become a reality.

I believe, therefore, that we are on the brink of an enormous change in the way we as a community make decisions. The Official Information Act and the pressures that have lead to it manifest the beginning of that change. Our society has dramatically altered in the last 40-50 years. The social reforms of the 1930s brought about by the country's first socialist government have been followed up by the Tory socialist governments of the last few years. These have been positive changes, which have redistributed wealth through public education, health, and welfare systems. Most people are now moderately well educated, and so the enormous explosion of technology in the design revolution will have dramatic effects on our decision-making and constitutional structures. People are going to demand even greater access to information. They will want to be much more involved in making the decisions that flow from that information. And yet our system, which was born over 100 years ago, is not equipped to deliver the goods. But political pressure will bring about the necessary reforms.

You will see in your time a different electoral system in New Zealand. You will probably see proportional representation of some kind. You will see the use of initiative structures and referenda systems in your time. And in the process you will see power restored to a working chamber in Parliament. I believe all of that is going to happen because the public will demand that it happens. The pressure is already on.

Discussion

Arthur Davis (State Services Commission)

I wonder if, as a backbencher, you have noticed since 1 July any different attitudes to questions directed to the bureaucracy on behalf of your constituents — for example, regarding housing loans, benefits, and so on. As you will be aware, the Act requires the bureaucracy to deal only with the individual who is seeking personal information. Members of Parliament have hitherto been in a privileged situation and have extracted all sorts of information from departments. Also, during your earlier remarks you said that questions in the House often run into obstructionist attitudes, particularly if those questions are — as you described them — relevant. My experience suggests that some of these questions are indeed irrelevant, in that they display a reluctance on the part of MPs to do their homework. Often the answers are available in published material.

Garry Knapp

No, I haven't detected any change in attitude. As far as Parliamentary questions are concerned, I wouldn't like it to be thought that we don't try to seek information before raising questions in the House. We do. I think that at least half the questions on the order paper are irrelevant, in that they are the ones government members ask of their own ministers. By "irrelevant" I mean those questions that are freely and fully answered because they are on matters that are not politically sensitive. The questions that really count are the ones that pin-point some government mistake, miscalculation, or policy directive that is not consistent with some other point that's been made. For instance, I have asked repeatedly for Treasury forecasts of inflation to see if they are consistent with the Minister of Finance's. But that is considered confidential information.

Dallas Moore (Ministry of Works and Development)

I am interested in Garry Knapp's comments on the problems of a third party. Have you thought of using party members here in Wellington to seek out information for you, using the new Act?

Garry Knapp

To use the Official Information Act is a fairly straight forward and simple exercise. It just requires writing a letter, and I can do that myself with great rapidity. Although we employ from our own resources a little extra help, we simply cannot cope with the volume of work we're involved with, and little of that revolves around this Act. I have not used the Act more than once so far. I am considering using it on one other matter, because I want to see just what we can do with it.

Warren Berryman (*National Business Review*)

There are obvious cases where confidentiality is necessary, and journalists come across these often — for example, when we deal with the names of police informants. There's a lot of information the business community must give to government, and there are good reasons for keeping some of that confidential. But a distinction needs to be made between that and information provided by someone who's going to government asking for, say, an import licence, subsidised electricity, or whatever. Who receives these "favours"? On what grounds? Doesn't the public have a right to know? Have you thought about any guiding principles as to when government should grant confidentiality and when it definitely should not?

Garry Knapp

I think we have to weigh each case on its merits. It would be very difficult to establish firm guidelines. There are areas in which I would not pursue information, and there are those where I would pursue it vigorously.

Brian Candler (Australian Commonwealth Attorney-General's Department)

The American literature suggests that congressmen and congresswomen have used their FOI Act quite effectively to obtain factual information on which then to press the executive. It has also been suggested that it makes it very much more difficult for an executive to give a "blind" answer — an answer which doesn't give any information — if information can be obtained through the Act. So if a backbencher is prepared to ask a question and then test the answer outside Parliament through a request under the Official Information Act, he or she may subsequently receive better answers in the House.

Garry Knapp

That's an interesting comment, but it's a little early yet to say how far we can take some of these matters. I hope to pursue the poliomyelitis vaccine issue. I have been carefully collating the information that's already available, and have been seeking more from overseas. In this and other instances it is a question of how we actually use the Act, but I am cynical when a minister has the final say on disclosure: not being able to get past that block on sensitive issues seems to me to be rather final.

Some Implementation Scenarios

Les Cleveland

Ian McGill

Since the introduction of the Official Information Act publicity has focused on specific requests for information and the responses of officials. You have been monitoring this process. Have you noticed any effects arising from the Act which have implications for administrative procedures?

Les Cleveland

Yes. I think that we should now be thinking a lot more about the potentialities that the Act has got for the actual administrative processes of government. We have got past the stage now of arguing about whether it is a good thing or not, and even about what some of the implications might be. I don't think there is going to be an enormous, scrambling, rush of people suffering from some desperate urgency to know what's inside the filing cabinets. In fact, I think things will lumber on in pretty much the same way, and that the controls that the Act has within it will stop it from producing a kind of orgy of knowledge. Knowledge, as far as government is concerned, will probably retain its somewhat elitist position. But there may be some pay-offs, and we should be taking a constructive approach to them.

We should now be looking at the governing process and asking how this Act can make it work better. So I think we should start talking about improving the way a service or a department puts labels on the information access points that it has in its system. That is something that should be contemplated across the whole range of government services. What are the access points and how accessible are they to people? Then if this is done carefully it might bring information users into closer contact with the actual routines of government. It is a kind of educational activity. If the access points are clearly labelled and more people begin to use them systematically, then

Les Cleveland is a Reader in the School of Political Science and Public Administration at Victoria University of Wellington. He was not able to present his views in person to the convention. Instead, he took part in an audio-visual presentation with Ian McGill, the Institute of Public Administration's National President. The Institute gratefully acknowledges the generous assistance provided by the Video Unit of the State Services Commission in making the presentation possible.

you are educating your clientele, and as a consequence they may find out a bit more about how services actually work. Also, those who are providing information may become more aware of their clients' needs. I am thinking here particularly of the weaker and less well organised clients: some of the incompetent pressure groups that there are about, many of whom will benefit by a more systematic knowledge of how some of the departments they are interested in actually operate, how they arrive at their policy decisions. And I am thinking also of the less competent journalists, some of whom will benefit from a little knowledge of the actual administrative routines and procedures of government. If those pay-offs emerge this might lead eventually to a somewhat better informed climate of discussion about government services and policies.

So I see this Act as an extension of the educational process, but an indirect one which need not involve preaching. The other potentiality here is that it might encourage some people to seek common ground, to drop some of the adversarial attitudes and assumptions that often hinder rational discussion in many areas of policy-making in New Zealand. I think we have had far too much of the adversarial presentation of things, not only in politics generally but also in the discussions that have led up to the Act itself. There has been a good deal of publicity generated by those who see it essentially as an extension of the adversarial climate of New Zealand politics. They tend to see the government agency as a kind of castle with a big barbed-wire fence around it, with the information-seeker outside carrying a pair of wire clippers, a bayonet, a slasher and a flame thrower, trying to blast his way through. If it is going to work properly, of course, that attitude needs to be changed, and it is quite obvious that the state services have been very nervous about how the Act is going to affect them. They are not looking forward at all to an army of invaders stampeding into their reserves or hunting around in their filing cabinets. I sympathise with them. I wouldn't particularly want to have an army of students coming into my office and ransacking my own cabinets (even though they have got no secrets in them at all). But, seriously, I think that we should be trying to develop the kind of atmosphere in which the adversarial tradition can be relinquished or softened, and that is one of the reasons why I think that everybody who works in the state services and is likely to come into contact with information-seekers needs some basic training, not only in how to handle citizens coming in wanting to know things, but particularly in how to deal with the news media. As far as I know training programmes in the state services have not catered for this in the past. But it is a piece of professional equipment which every state servant now needs. But I go further than that: I think that journalists need training, too, in how the state services operate, and in what sort of information possibilities they present, especially in the specific fields that they begin to apply themselves to. So there is a mutual need here. I think that the news media industry and the state services need to co-operate on this. They should be holding joint training seminars and periodic joint discussions about whatever progress they might be making in this, or about whatever problems they are encountering.

Ian McGill

Is something more required to change the attitudes both of the public servant and of the person seeking information?

Les Cleveland

It probably requires a shift in the way we think about ourselves, and particularly about the way government thinks about itself. I think we should now all be talking about government as an information network instead of thinking about it as so many administrative units, and instead of worrying about concepts like ministerial responsibility and the "fearful" prospects of the increased politicisation of the state services. Those *are* problems, but they tend to diminish if you begin to use the concept of a network that links or should link the entire array of government services, which can be thought of as an information system. In network terms, I think we now need to develop, for example, standard routines for the storage and retrieval of data, which would mean that you could approach the system at any point and you could use the same methods for finding out what it has to offer and how to get hold of it.

When one talks like this, of course, one argues that what we really need is a computer-based official information service with citizen access. But in the meantime and for obvious reasons we have to make do with techniques that are now obsolescent. I am talking about print media and the telephone. Those are our main agencies for operating this network as it stands. And computer-based services at the moment are part of the language of science fiction as far as New Zealand is concerned. In cybernetic terms, New Zealand is living in the dark ages. We haven't even got a communications policy, let alone recognition of what you can actually do with the more sophisticated technology that is available for information networks. But that doesn't excuse us from using a concept.

Even by our obsolescent standards we have still got two very underused resources. There is the telephone book, which is in practically every household, and there is another interesting document called the *New Zealand Official Yearbook*. We could quite easily insert a section in the back of the telephone book that describes the ramifications of the network and how to operate it. It could become the user's manual for getting into the government information network. You could put extra detailed information about specific agencies — for example, the welfare services, which practically everybody in New Zealand has dealings with at one time or another — into a reorganised version of the *Yearbook*. So when you look at the back of the telephone book you find the bare details there about approaching a particular part of the welfare services, and you would be referred to the *Yearbook* for further information. There is no reason why quite a lot of things couldn't be done with the *Yearbook*. You could, for example, print it in paperback instead of putting that expensive hard cover around it, and you could give the thing away. Or you could put it into libraries, and into post offices and places like that, for nothing, where people could actually get hold of it and use it. You would have to revise it, of course. You would have to re-arrange the way it is presently set out, and pack a lot more information into it. But

if you seriously want to make it easier for people to interact with government services this is the sort of enterprise you have to embark upon.

We should also be teaching civics in secondary schools. A compulsory course in the fourth form would probably do the trick. And by "civics" I mean courses on how government works. If the *Yearbook* were reconstituted and turned into a civics manual you could use it as a text book. Then at least people who have been through the secondary school system would have some minimal basic knowledge of the structure of government and of the elementary principles on which the state services function. At present these people don't have this.

Ian McGill

What happens when the information-seeker has identified the point of contact in the department concerned? Is there anything that needs to be done to assist both the department and the person requesting information?

Les Cleveland

There are, of course, many consequences, and I imagine that most departments are right now looking rather nervously at this problem. In fact, some of the better organised departments, perhaps the ones which are of necessity more conscious of their public relations, are already very active in the information business. Let's not talk about this as if it were some 1983 miracle. There is an enormous output of information from government. It is one of the ironies of this whole discussion, you know, that everybody talks about official information as if it had just been invented. But in actual fact a tremendous flood of material comes out of government, far more than any citizen can cope with. Some of it is perhaps unmanageable, some of it is written in a rather opaque style, and some of it is also becoming increasingly expensive, which I note with alarm. Last year it cost me $15 to buy a copy of *The Estimates*. I think that that may well have been its actual cost, but as a means of putting that sort of data in the hands of citizens it seems to me to be unduly expensive. Unless, of course, you don't particularly want them to have it.

Anyway, there are lots of departments that are very busy in the information field. The police, for example, are very astute users of the mass media. They get an enormous amount of free publicity. Because they are a profitable news source journalists are always seeking them out and attempting to maintain good relations with them. Often the police are able to use the news media channels to propagate messages which they wish to spread widely throughout the community, and in the process they often do some public relations for themselves. So if one wants to find out how to use the media I would advise study of the police. If you don't like that idea try the Ministry of Transport, because they have been running road safety campaigns in schools with a fair amount of success for a long time now, and they have figured out the nuts and bolts of how to do it. The Ministry of Works and Development has been using information centres on project sites lately in an attempt to get some of their objectives across to the public, and they have some rather special reasons for doing that. They have been under attack, and so they

are doing something about fighting back. Then there is the Forest Service, which has been moving into some quite ambitious public relations efforts lately because it has responsibilities in state forests. Indeed, the Forest Service has found itself doing historical research into some areas which they have inherited. They have been using the data that they have gained in this way to write pamphlets and also to offer guidance for people who want to use state forests. So here you have got a very simple, functional, relationship with the citizen who finds himself in Hokitika with a couple of days to spare, approaches either the Forest Service or one of its data access points scattered around the place, gets hold of certain pamphlets or maybe talks to a forester, and then goes to one of the suggested places for recreation or whatever. The Forest Service has got all this linked up with a fairly ambitious recreational programme and they co-operate in this with the Lands and Survey Department, which has also found itself involved — particularly in Westland — with conservation and other problems. It, too, has been doing some area management and generating a fair amount of publicity about what the possibilities are for people who want to get out in the open and explore some of these places.

Well, these departments are really crusaders because they have a mission to fulfil. It may be expressed in some slogan like "Keep New Zealand Green", or "Use your Native Forests", or something of that sort. But they do have a serious long-term policy, and an educational programme that accompanies it. Out of necessity they have been doing a lot of experimental work with pamphlets and all kinds of literature, field expeditions, and talks. So their professionals are, willy nilly, public relations officers.

Ian McGill

The Forest Service is obviously doing a lot to present its case to the public but, perhaps paradoxically, conservationists like the Native Forests Action Council say that in some state forests the Service is doing the wrong things. How should a department like the Forest Service address pressure groups?

Les Cleveland

There are two ways of looking at pressure groups. One is to regard them as a nuisance and do everything you can to discourage them — keep them as misinformed as possible so that every now and again you can discredit them by saying they simply don't know what they are talking about. That is the good old fashioned, adversarial, technique. The other method is a bit more sophisticated. It involves trying to co-opt them into your programme, to seek them out, to take trouble to explain what your programme is and what your policies are; if necessary to bring them in early in a consultative role. The Forest Service has been experimenting with that kind of thing. It has had a fair amount of success in arriving at linkages with some of the environmental groups that have been very hostile towards some of its policies. If you do that your critics at least understand what your objectives are and, of course, you may learn something from it. Instead of sitting inside your fortress with all the drawbridges and barricades up, and the oil boiling on top of the

battlements, you encourage people to stroll in and out. You have a yarn with them and you find out what they are on about. And perhaps you get some co-operation out of them. At the same time you find out things about your policy. You find out how your critics see it. You may even find yourself adjusting it a little bit, taking a few precautions to try to avoid some of its deficiencies.

This is where the concept of learning capacity comes in. If you are operating an information network one of the pay-offs is to improve your learning capacity. Because if you can increase the volume and the rapidity of the information transactions that are taking place through the entire network you should be able to increase your learning capacity as a consequence. But you have to use your information inquiries as a feedback source, and that means monitoring them and making responses to them. You can then take whatever remedial action might be required. You find that if you had, say, 500 inquiries about something over a period of three months, you ask yourself why people were making them. What was the reason for all this activity? What is behind it? What are these people worrying about? And what implications do their worries have for this department's policy? It is that sort of question which might lead one to go over one's policy and consider making a few changes to it.

You can actually do more than that, too. You can take the next step, which is actually to influence clients. If you kept records of information inquiries over a period of time you might then be able to locate specific people among your general public who are actually interested. Maybe they are in pressure groups, maybe not. Or maybe some of them are involved in some of your programmes. You can actually get to know some individuals this way. And you might be able to recruit them in some sort of consultative role. You may even go to the trouble of organising discussion panels for the sort of topics that concern you. If, for example, you are running a public health programme, why not recruit some uncommitted, ordinary, citizens whom you have located through this informational activity and hold informal discussions with them about aspects of your health programme? You could do the same thing in broadcasting, or in film censorship, in housing, penal reform, energy development, or forest management, to name just a few. Some of those are areas in which there are pressure groups and commercial interests, but they might not be much help to you because they may be putting out signals that you already know about or which are strongly biased in some direction.

It is this ability to locate the uncommitted citizen that seems to me to be important in this kind of thing. The monitoring of information inquiries might be one way in which you can pick some of them up. And you use the feedback you get from your discussion groups to test your performance and your policies. If you are particularly smart you can also feed material into your discussion groups in the hope that it might percolate through to other levels, and so might indirectly influence public opinion over a period of time.

Ian McGill

One of the things that you may find is that inquiries tend to be concentrated at times when policy decisions are being made. Does the Official Information Act allow you to do anything about making available information relating to earlier decisions? What options does it open up for the public?

Les Cleveland

Theoretically, the options are very wide. There is an enormous amount of discretion available in operating the Act. I see nothing to stop an agency from putting out material which is speculative and clearly labelled as such and which is part of the lead-up towards policy formulation. If you were thinking of doing something in public health or forestry, for example, in say 12 months' time, I see no reason why you couldn't put out a discussion paper or two, or why you couldn't reproduce some materials that you already had, with the suggestion that anybody who had anything to contribute should come and talk to you about it. Of course, if you have a sub-system of discussion groups around the country, you would give this to them to talk over. The nearest thing to this that I have had personal experience with were the programme advisory groups that were set up some years ago to thrash over particular problem areas in broadcasting. These bodies couldn't decide anything. They were really "talk shops", with a fairly broad composition, and they looked at quite a lot of material that the then NZBC generated. Key broadcasting officials wrote discussion papers for these advisory bodies to talk over. It can be a big sweat having to turn up and engage in this sort of discussion, and it could become a rather tiresome industry, but I think on an informal basis and carried out sensibly this approach to identifying opinion about issues and problems can be fairly useful.

The other advantage of it is that it is essentially an integratory approach to policy. It actually gets away from the adversarial attitude whereby the agency announces the policy and then there immediately is generated a set of conflicts about it. The integratory approach makes policy the subject of negotiation, discussion, debate, talk and consultation, well in advance. This is one of the advantages of thinking in terms of systems, because systems theory as a model for the governmental process does presume that everyone will make the necessary collective effort to see that the system works. Systems are inherently integrative, and so if you are operating an information network as part of the system you should at the same time be trying to integrate people into its operations.

So what I am talking about is an integrative approach to the relationship between the citizen and the administrative structure, and I personally think we could do with an awful lot more of that in New Zealand politics right now. That could possibly be the most productive thing that emerges from the Official Information Act.

Discussion

Patrick Millen (Secretary of the Cabinet)

I'm glad someone has drawn attention to the *Yearbook*, because I've used it more than anything else in dealing with news media inquiries.

Dallas Moore (Ministry of Works and Development)

Because I see former Prime Minister Sir John Marshall here I would like to invite a comment from him. Les Cleveland was suggesting that we should draw in different groups in the community to discuss policy development and administration and so on. It seems to me that we did attempt something like this when the National Development Conference was set up in 1969. Would Sir John like to reflect on the experience of that structure in this regard?

Sir John Marshall

If I may digress first of all on the comment about the *Yearbook.* It's not only a very useful source of information on current matters. For instance, I am presently involved in commenting for a National Film Unit programme on housing. I looked up the *Yearbook* to see what the National government did in the years 1949 to 1954, and it was all there. So I impressed these researchers with my instant knowledge.

The National Development Conference was a process of sharing government's aspirations with the people who had to carry them through. I think it's comparable to what Les Cleveland was suggesting only to the extent that it was dealing with specific issues with the people who were directly involved — manufacturers, for example, farmers and so on. Obviously, the Official Information Act is much broader. It enables any citizen to acquire information. I would also like to confirm the point that there always has been a tremendous amount of information available from government, if people know where to go for it and are interested enough to make the effort. What is being done now perhaps is to make people more aware that the material is available.

Robert Gregory (convention chairman)

It's quite possible that this sea change away from the so-called adversarial style of politics towards a process of co-operation need not be such a desirable development in democratic terms. Rather than indicating that governments are now more prepared to share power, to listen to people who will be affected by policy proposals, it might simply reflect the fact that governments are increasingly better equipped to persuade people to accept the official will.

Chris Reid (Health Department)

Les Cleveland touched briefly on the value that computer-based services are going to have in the future. In the public service there are a number of people concerned with computer services who make the point that such things as registry files, and central library services could be more integrated within a technological service.

Tony Loorpag (New Zealand Administrative Staff College)

One of the questions is whether our record systems are sufficiently well organised to be transferred to electronic media. There are devices available which can be placed on counters to enable members of the public to do their own search of the files. But how long is it going to take us to organise the information so that this can happen?

Patrick Millen

In the cabinet office we're trying to devise a programme that will enable us to retrieve our records by electronic means. Frankly, it's defeating us. The problem is — and perhaps I am over-simplifying it — that in getting cabinet agenda together some very quick decisions have to be made on headings and things of this kind, and there's no way you can be sure these decisions will be consistent over time. I'd be loath to transfer my records from the manual form, where at least if it gets misfiled you've got a reasonable chance of finding it again.

Chris Reid

I would suggest that as the community becomes aware of the form in which information in various departments is held there could be pressure to update it. I am thinking of my own department, health, for example. Although we have

a very good records system, we also in a sense have one system for head office and others for our district offices. People may want to know why records are not standardised, or centralised.

Patrick Millen

The other problem in this area, one of resources, is that you know in the beginning that something less than one percent of the material is ever going to be required again. I would suggest that in my area much less than one percent is ever required again. So how do you select the material?

Sir John Marshall

I think it is generally a myth that cabinet papers are secret. The rule is that they are not to be disclosed for 25 years, but the plain fact is that although the actual paper is not publicly available, the contents of it are, in the form of the decision and the justifications for it.

Chris Burns (State Services Commission)

Sir John's comments are very reassuring to us as members of the public, but I think the public is also interested in the information which leads to the decision.

Cheryl Campbell (National Archives)

I was interested in the comment that there is very little information used by government that's ever wanted again. When it is wanted again, usually by researchers, if we're lucky it might be in National Archives. But we record and arrange material according to the records systems of individual departments. So if these systems are in a mess, don't expect the information to be perfect after it goes into Archives. I'm not sure what the answer is. Records sections have often received inadequate staffing but records management is now becoming a specialised, professional field in itself.

Arthur Davis (State Services Commission)

I can report without any guarantee of delivery that the commission is grappling with this question of information management. We find ourselves on the edge of a new era of information technology, which in itself is changing by the week, and trying to keep up with it is a full time job. But we have not lost sight of the problems that have been raised here.

Brian Candler (Australian Commonwealth Attorney-General's Department)

The American experience has been, and the Australian experience has already started to show us, that once records management becomes politically sensitive in that departments are unable to meet their obligations under official information legislation, then something is done.

My second point is that the Australian archives are at the moment being computerised in terms of — to use their language — the *intellectual* control of documents and the *physical* control of them. Physical control tells what documents exist and where they may be found. That information can very easily be computerised. The more difficult task is intellectual control, which tells of the content of the documents. Getting on to the hardware available a usable synopsis of the contents of documents is proving to be a real problem.

My third point is that the Social Security Department speaks of itself as being a non-paper office. They believe that they will soon have all their records on computer hardware. They are installing their third generation computers at the moment. The only people who will receive paper will be the clients. The department itself will not use paper. Moreover, in the case of unemployment benefits, for example, once the client has ceased to receive benefits after two years his or her records will be destroyed. We have had a great deal of trouble getting the message through to the people who might want to use our FOI Act, which is document-based, that some of the information they might seek no longer exists.

Ian Miller (State Services Commission)

I would like to mention three points that arose from Les Cleveland's presentation. First of all, he commented on the perceived need for people within the

state services to become more proficient in dealing with the news media, and he felt there was a case here for training. In fact, within the State Services Commission the training and development division has been sponsoring courses in news media interview techniques for senior public servants for at least the last couple of years. And I am aware that in some departments there has also been a lot of effort made in this direction. I understand that in the Justice Department, for example, all controlling officers have received news media interview training. I believe the same can be said of the Ministry of Agriculture and Fisheries. So the problem, if there is a problem, has been recognised. Perhaps state servants generally need to know more about the news media, as Les Cleveland suggested. There is a tendency towards polarisation when the media and state servants come into contact.

My second point is about the possibility of encapsulating information in the *Yearbook* and putting a version of that into the back of the telephone directory. I would be very interested to hear the Post Office's reaction to that, because it would probably be a fairly expensive exercise. But of more particular relevance is the fact that the commission is producing a directory of official information, which should be available later this year. It will have about 400 pages.

My final point relates to information management. (I think we are getting hung up on the term records management.) I believe that within the state services there have been some significant advances in information management techniques. There are the computer-based operations that we have in the law enforcement area, in social welfare, and inland revenue, and in the reservation system used by Air New Zealand. We are moving into an era when we can use technology to gain easy access to information. We have to make the further step to bring in the information that we currently refer to as records, and link it all up together in such a way that access becomes easy. Both the Ministry of Defence and the Housing Corporation have made some very significant advances within the past 12 months or so in information management, specifically in the area of records.

Tom McRae (Consultant, formerly of the Ministry of Works and Development)

People are quite free to use computers. Their work, in relative terms, differs little from the use of the abacus by those who built the Great Wall of China. But I think that sooner or later we, the citizens, are going to ask what these people are up to. What information are they putting together about our social and economic activities? We would like to know.

Four Permanent Heads Consider the Official Information Act : A Panel Discussion

Don McAllister

Before we begin, perhaps I should first go over what I think are the main points that have come out of the convention's deliberations so far. It is clear that in striking a balance between the right to know and the need to conceal, the Act in effect places the onus on the administrator to decide. In this it is the spirit of the Act that is at issue. It is the attitudes that the practitioners bring to bear in administering the Act that will determine whose side the public service is on. For officials now find themselves very much the mediators between the politicians and the public. I am suggesting that in each case they need to weigh up the requirements of constitutional conventions, and those of an informed citizenry. It is also very clear that it is not information itself which is really at issue. There is all too much of it. What matters is the way it is structured. What has come out of the discussion is that the most important structuring is that of which we are not aware. Les Cleveland made the point that involved in all this is an educative process, on both sides. Perhaps that is the principal argument that needs to be emphasised. Either the public servants must educate the questioners so that the latter really do know what they want to find out, or the questioners have to know what information exists before they ask. However, with no more ado I will ask each panel member to say what has happened so far in his department and to indicate what he thinks will happen in the future.

John Grant, Director-General of Social Welfare

It would be fair to say that as far as the Department of Social Welfare is concerned this Act has been a slow starter. The main reason is that the personal information held by the department on individuals has always been freely available. After all, 90 percent of that information is originally given to the department by the individuals themselves. There have been fewer than 200 requests, only a handful of which have been turned down. Two requests from energy boards for addresses of beneficiaries were turned down, for example. But, perhaps surprisingly, there

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The discussion was chaired by Don McAllister, a Senior Lecturer in the School of Political Science and Public Administration, Victoria University of Wellington.

have been about 14 requests for departmental manuals. One was from a metropolitan newspaper for the unemployment benefit manual and the sickness benefit manual, which they intend to publish. An interesting case concerns medical examinations, and a request declined in this area is the subject of the first appeal made against one of our decisions.

A medical certificate indicating that a person is unwell and should take three months off work can be freely given to the person concerned. But what about when there is an application for a war pension on the grounds, say, that the disablement from which the ex-serviceman is suffering was due to his war service 30 or 40 years ago, and the War Pensions Board requests more than one medical specialist's opinion on whether or not this particular disablement is indeed attributable to that service? The Board, which receives sometimes very frank professional opinions from its medical advisers turned down a request like that, and the matter is now with the ombudsmen's office. Before the Act came into force we would probably have let the applicant have that information, but through another medical practitioner.

We also had a request from solicitors for copies of manuals on how the Social Security Commission deals with *de facto* relationships. They were freely given. The only policy request I have had was for an explanation of the department's new policy proposals for 1983/84, which were announced after the Budget. I gave that information willingly enough — about 98.5 percent of it, anyhow — but because I had difficulty interpreting the extent of the request I left it up to the recipient to come back to me if it were thought that I had held something back.

Harry Clark, Secretary of Trade and Industry

I can't give you the number of requests we have had, because we do not record requests; and the reason we do not is that during the run-up to the passage of the Act as required we did a three-month exercise recording requests for information. There were something like 14,000 requests in all. The biggest returns were of telephoned and written questions about, for example, tarrif item codes. So if we recorded requests for information we would be in danger of adopting a defensive attitude, by wanting to know whether a query was being made under the Official Information Act or not. At that rate we would not even be able to tell inquirers the time of day. We only record those requests under the Official Information Act where the information has been declined in whole or in part. Before I tell you the startling number I must say that I think The Treasury would have received some requests which would otherwise have been directed to us, because information going through the officials economic committee to the government is regarded primarily as Treasury's information. They are the receiving point for it.

We have, in fact, declined 10 requests under the Official Information Act, in whole or in part. There were four in head office. One involved commercially confidential information and was declined. Another one was a case where a white paper was being prepared, and that was declined on the grounds the information would be made public shortly. The third was a request from an importer, virtually for his own file, and that was

declined in part because we had to excise from that file certain information that related to other companies. The fourth one I cannot speak too much about because it is currently with the ombudsmen, but it was a request for a copy of the draft Competition Bill. The Auckland regional office has declined five requests, one of which was mistakenly made on the day of the Act's introduction. That one and three others were for other companies' confidential information, and were declined, while the third one was from a company against whom there had been a complaint under the price freeze regulations. The inquirer wanted to know who had complained, but he was told that that information couldn't be divulged. The final one, and the sole one from the Christchurch regional office, is interesting. A person wanted to know why a voluntary group had a hardship application approved under the price freeze, and was told that that information could not be released. Subsequently through the officers of the regional office the voluntary group concerned made the information available to the inquirer.

As to the future, the major problems we as a department may have with the Official Information Act concern matters of commercial confidentiality, and of advice to government.

Bernard Galvin, Secretary to The Treasury

Being a much smaller department — it is essentially only a head office — we have operated a centralised system. All requests for information under the Act are referred to one officer, who makes an initial decision as to whether or not they should be handled by The Treasury or passed on to another agency. He also checks whether a New Zealand resident is actually asking the question. He has had some problems with the due particularity requirement — there have been one or two fishing expeditions, where the inquirer has not been explicit about the information that is sought. (One was from a local authority which wanted all the papers on urban passenger transport in our possession during the last three years. The request was refused.) Once he has decided that the question is a proper one under the Act it is then referred to a divisional director, who makes a judgement on whether it should be answered or not, in full or only partially. That is then referred back to the central officer, who then has that decision confirmed by myself.

So what has been the state of play? We have had 34 questions directed to us, or referred on to us from other departments, or from the minister's office. That figure really understates the number of questions received, because in many instances they were multiple questions. Only five have been from the news media. Nine have been from individuals, eight from MPs, six from action groups — mainly the Coalition for Open Government — and six from what we have classified as other organisations. Of the 34, 11 have been answered in full, five have been answered partially, eight have been refused, and 10 we are still sitting on, including two where this due particularity question is being clarified.

In most cases refusals have been on the grounds of the need to preserve the confidentiality of advice to a minister, or the preservation of the free and frank exchange of views. One was for commercial information given to us by another agency, and which if supplied could

have affected the Crown's operations and negotiations. We do foresee some difficulty under Section 23 of the Act where people may ask for information about decisions on proposals that they have made. So far, when the inquiry has centred on advice to ministers the position has been clear: the request has been declined.

The area where we have had the greatest difficulty concerns comment on the state of the economy — our economic reviews and forecasts. It was in the forecasting area that we made quite a major decision: we published the three-year forecast of government expenditure. Well, we didn't actually publish it. It was a question asked of us by an MP, and he was given the answer, I think much to his surprise. (Interestingly enough, the information hasn't surfaced yet.) I think this raises one interesting point, namely that the use of the Act is going to force government to publish these forecasts without further ado.

Richard Featherstone (Health Department)

In respect of the requests turned down because they related to the free and frank expression of opinions between public servants and ministers, did The Treasury make those decisions by itself or did it feel obliged to consult the Minister of Finance?

Bernard Galvin

To my knowledge the minister was consulted on two occasions.

Denis McLean, Secretary of Defence

I am the only member of the former Danks committee on this panel, but I notice that some of my colleagues from that committee are in the room — just to make sure, I think, that my department for one hasn't snuffed out the flame that we so laboriously worked up over those two or three years on the committee.

In the Ministry of Defence we have an astonishing range of information, perhaps more so than any other department — from high policy information, to the most technical kind of data on how to run ships and aeroplanes, to highly personal information about large numbers of New Zealanders. One could expect, therefore, extensive interest in what we provide. But after having gone to quite elaborate lengths to prepare for the introduction of the Act we feel a bit like the person in Gracie Fields' song: "I took my harp to the party, but nobody asked me to play". We prepared a brilliant manual, which has gone out to all and sundry; we sent people around the country briefing those who were going to be our decision-makers on this issue; we designated decision centres, and so on. But the expected upsurge of demand for all this highly interesting information has not eventuated.

I would make a general point that probably there are undue expectations in the community about information held by departments. There is a solemnity about the application of this Act which probably will take quite a long time to wear off. People believe that there is in the centre of departments some kind of secret room where a few acolytes have access to a golden book entitled POLICY, and that everything is written down in it. Of course, it is not like that. Administrative life is much more pragmatic. The result is that the information often is not there at all —

which reminds me of the gentleman who is convinced that we have in our files all that needs to be known about unidentified flying objects. He won't believe that we don't have very much about them. So there is that kind of undue expectation, which might never disappear. I think, too, a lot of people — even the press -- are still approaching us with perfectly ordinary and acceptable requests for information, saying that the particular matter is not one of national security and that we should let the material out. But we would not have had the least intention before the Act or since of holding it back. There is a problem of adjustment in thinking which has not yet been properly worked through.

I have not heard of any reasonable request which we have had to decline. We have had a lot of requests for information which has been available all the time: for example, material which had been tabled in the House several years ago, and that sort of thing. So there is a problem with being asked to do people's research for them.

We have had only one request for a military operations order, one that was highly classified, and related to the voyage of *HMNZS Otago* to Mururoa Atoll about 10 years ago. We were able to release it, with one or two little blank spots in it. We are perfectly willing to examine that kind of request.

There is a problem that is only just surfacing, which I don't think we focused on in the Danks committee. Since the Act came into force some people have been charged for information which before we would have given them for nothing. As I said, we hold a great deal of personal information about hundreds of thousands of New Zealanders, and we have always adopted the principle of giving that information to the persons themselves, but not to anybody else. But you now have genealogists wanting access to that kind of information, and they are going to be charged for it because they usually want about 10 generations covered. The business of charging for information is introducing a reticence which wasn't there before.

Chris Burns (State Services Commission)

A question to the whole panel. Since we have here four permanent heads who have lived through the days of the Official Secrets Act, could I ask what changes have occurred in your decision-making since the new legislation came into effect?

Denis McLean

We certainly would not have released that operations order before. It would have remained classified as secret until somebody formally took the decision to declassify it, probably after 25 years or so. Now the question of declassification can come up much earlier.

Don McAllister

Are public servants still required to sign the official declaration of secrecy?

Arthur Davis (State Services Commission)

The official declaration of secrecy has been abandoned and replaced by a declaration of conduct. This simply requires a public servant to abide by the rules and regulations relating to conduct. The commission expects departments to make it clear to all staff members what their duties and responsibilities are in regard to the Official Information Act. Denis McLean referred to designated offices, or points where information is to be released. Most departments will by now have designated certain officials who will make the decisions to release or withhold information.

Bernard Galvin

Apart from the move towards the publication of government economic forecasts, which I have already mentioned, I think that over time there will be a greater tendency for more of the commentary-type papers also to be released.

Harry Clark

We now publish lists of holders of basic import licences. We publish the policy notes used by staff members making decisions on import licences. We have published not only the conditions for hardship applications under the price freeze, but also — as a deliberate act of policy for reasons not entirely connected with the Official Information Act — the instructions to delegates when they make decisions on hardship applications. I should have mentioned earlier that we have had some requests for personal information, as distinct from corporate personal information, mostly from our own staff. They have been asking for information that I would have let them have anyhow. Most seem to think that there is some great mystery on their personal file, without realising that everything on it they have put there themselves or they have seen before it went there. There is some information about staff which is not on personal files, but in safes somewhere. However, the person it concerns knows of it before it is put in the safe.

John Pohl (Ministry of Energy)

Two of the speakers mentioned that questions were referred to them under the Official Information Act. Is there some suggestion that a person can ask a question which isn't covered under the Official Information Act? I can't see it, myself.

Harry Clark

I was trying to avoid the distinction. All through our history we have had questions asked of us, most of which we answer. What we are obliged to record under the Official Information Act are those cases where we have declined to give information that was specifically asked for in terms of the Act. I was trying to show the need for people who have authority to answer questions not to get so bound up with the Official Information Act that they stop giving out information they would have released readily before the inception of the Act.

Patricia Norton (Department of Labour)

Bernard Galvin has mentioned the release of government economic forecasts. Has he also been asked for the methodology on which those forecasts are based? If so, has he released that information; if not, could he indicate what the reasons are?

Bernard Galvin

A fifteen-year forecast given to the Ministry of Energy contained commentary on the basis of the figures. The forecast of government expenditure that I mentioned provided methodological information only in general form.

Patrick Millen (Secretary of the Cabinet)

Bernard Galvin mentioned possible problems with section 23 of the Act. Could he comment further, please?

Bernard Galvin

I would have thought that when you have to disclose information about the reasons for certain official decisions or recommendations you are often talking about the confidential advice between public servants and their minister. It's for this reason that section 23 could lead to problems.

Harry Clark

It doesn't worry me much, but I would agree with Bernard. There is also a possible conflict here in terms of commercially confidential information. We will give the reasons we declined a person's import application, but if it involves comparisons with other applicants or other licence-holders we will stop short of disclosing information that gives that person knowledge of the other company's business.

Warren Page (*The Evening Post*)

John Grant, you mentioned that you disclosed 98.5 percent of information about a policy matter. Wouldn't it have been obvious that there was a blank space in the paper?

John Grant

No. I just stopped short of going to the point of disclosing advice to the minister and that sort of thing.

Warren Page

There was no indication then to, shall I say, the innocent applicant that there were some excisions from the information?

John Grant

I really don't think they knew exactly what they were asking for. The information they received satisfied them.

Bernard Galvin

This is what we have found. In a number of cases we have had considerable difficulty in trying to determine what the inquirer is seeking.

Warren Page

If I could just follow up. How long after a commercial arrangement has been made does it remain confidential?

Harry Clark

That is a good question. I mentioned that we do publish lists of basic licence-holders. The reason we went no further than basic licence-holders was the fact that the manufacturers felt that a lot of non-basic licences were for importing plant and machinery, and if on the day those licences were granted it became public knowledge that they were importing it their competitors would know what they were doing. We are now seeking the views of the commercial community on whether we should publish all licence-holders and all grants. If their initial answer is no, we have further asked if they would object to us publishing them after some delay, and what sort of delay would be reasonable.

Ken Keith (Faculty of Law, Victoria University of Wellington)

I want to come back to Bernard Galvin's comment on section 23 of the Act. My recollection is that this section is fairly close to what it was in the Bill. Some changes were made to it, but essentially the important amendments in that area were made to Part 4, dealing with the right of access to personal information. From early on in the deliberations the intention was that decisions affecting the non-release of information about individuals should have to be justified by giving them reasons. Section 23 is not subject to section 9. That is, the obligation to give reasons is not subject to those provisions about the free and frank expression of opinion, and so on. What is contemplated is that where a decision or recommendation is taken which is based on advice, and which therefore has to be justified in terms of that advice, the person requesting under section 23 is entitled to some explanation of the reasoning that led to the decision. After all, section 9 (2) (g), about the effective conduct of public affairs, is mainly designed to protect situations where there are disagreements, and where in the full and frank expression of opinion arguments are swapped and discarded, and so on. If in fact a particular set of arguments leads to a decision then section 23 says that they should be disclosed. Isn't that what usually happens, anyway, in the ordinary conduct of public affairs? For example, when the prime minister justifies a decision at midday on Monday, after a cabinet meeting, he often does so presumably in terms of the advice that he has been given. The particular cabinet paper that he has read will in many cases provide the basic public justification for what is to be done. So while section 23 does not necessarily require the disclosure of a particular document, it does require some kind of statement to be made about the reasons for a decision.

Arthur Davis

Bernard Galvin said it is sometimes difficult to know exactly what the inquirer is wanting. I too have seen some questions like this, but of course we are not allowed to ask why a person is seeking particular information. And what they do with the information is their business. However, there is provision in the Act to have conditions placed on the release of specific material. Have any of the panel members considered invoking that particular provision?

Harry Clark

Not in terms of the Official Information Act. It certainly hasn't come up. But in terms of the normal course of business, say with trade organisations and so forth, we often do just that. When we were dealing with industry studies the process of consultation necessarily became so wide that the best idea was to publish a draft paper, with some sort of statement by the minister explaining its status. Of course, everybody ignored the explanation and published the paper as if it were the final report as agreed to by the government.

Ian Miller (State Services Commission)

The view that has been developed on the use of conditions for releasing information is that where the organisation can justify withholding that piece of information in terms of one of the reasons given in the Act, but where there seems to be some countervailing argument in favour of releasing it to a particular individual or organisation, then it would be proper to do so subject to conditions. The example that will be familiar to many people here is that of a researcher coming to a department. That person would be asked to sign a declaration that they wouldn't disclose the information beyond the immediate requirements of the research.

Harry Clark

That type of instance isn't really an Official Information Act situation. If a university student, say, wants to do a research project he or she talks to us about it. I think you would only have to worry about the other point if you received an official request in terms of the Act.

Jeff Connell (Ministry of Transport)

We don't accept the commission's view about conditions. We think it's too narrow. We have applied conditions in one situation where we don't think we would have grounds for withholding, and that is in relation to the disclosure of witnesses' names. We may be prosecuting an offender and the offender's solicitor wants to have access to our prosecution file. In particular, the lawyer wants to know who our witnesses are going to be. We have said that we will give access to the prosecution file and give the names of the witnesses we are going to call, on condition that when and if those witnesses are interviewed by the defence solicitor one of our senior officers is present. Initially, when we laid down that rule we also included a requirement that if the solicitor took any statement he should give a copy of that to us. This was objected to by solicitors in Auckland so we have dropped that part of it, but so far we have had no strong objection to the principal condition.

Len Fahy (Managing Director, Accident Compensation Corporation)

I would like to take up the point that we are not entitled to ask what the information is to be used for. Recently we had a case where a perturbed solicitor asked for a copy of our manual. We hadn't at that point determined the price of the manual, but asked him what was the cause of his complaint. The long and the short of it was that we ended up by giving him a page of the manual. So I think we could put ourselves to quite a bit of trouble if we were always to take requests at face value.

Don McAllister

I think this raises the more general question of assistance to those seeking information.

Harry Clark

Yes, when you receive a request that is vague, from someone who is not familiar with the bureaucratic process, you may have to ask what the information is for, simply to find out what is wanted. I wouldn't hesitate to do so, whatever the Act says.

Denis McLean

We have just had one or two very broad requests for information about a policy issue, Vietnam I think, and they really were stated in simple terms. Clearly you have to try to find out what they are after. You have to point out that it might involve a vast research project which is going to cost a lot of money, but you also have to make it clear that the department is prepared to go ahead and do it. So you have to fine down broad bids of the fishing expedition kind, but which have perfectly legitimate objectives. You have to have some kind of dialogue with the people making the request, particularly when large costs are going to be involved.

Bernard Galvin

We have rejected such requests on the grounds of the lack of due particularity, which means that if they want to they can come back and ask a specific question.

Warren Berryman (*National Business Review*)

Harry Clark mentioned how his department consults with industry in deciding how to make some of its information available. Has the department ever considered consulting with the general public, because the public is affected by these decisions? I would suggest that it is in the public's interest more than it is in say the manufacturers' interest.

Harry Clark

How do you effectively consult with the public? I think that on matters of import licensing, you can consult with the manufacturers and with the retailers, for example. But how do you get the view of the general public? At the end of the day that view is expressed in the ballot box. The easiest way for us to handle people who want to know what happened to their applications, and why, would be to give them their file. But what we have to be sure of — because in deciding on, say, an import licence you are making a comparison among businesses — is that the inside workings of other persons' businesses are not disclosed to the inquirer.

Cheryl Campbell (National Archives)

It can be expensive if people want a lot of information on a fairly wide subject, and they should pay the department to do the work. But are departments developing provisions and facilities for people to do their own research in the relevant files?

Denis McLean

In principle, yes, but one of the problems we have found is that a lot of work needs to be done before we can even begin to say whether we are able to answer the question. Clearly, material that is released to Archives is not sensitive, and I would like to see much more material cleared to them. I hope that that will be one of the consequences of this Act. The Information Authority should emphasise that.

Observations by the Chief Ombudsman

George Laking

Leading up to 1 July last I was invited to attend a number of departmental discussion groups on the Official Information Act. I was not able to give them any help, but I offered them my sympathy. I made two or three other points, the first being that it is important for departments to work out their own policies in regard to the administration of this Act, in consultation where necessary with their ministers. I have been impressed by what has been said at this panel discussion about the issue of ministerial consultation. The other point I made was that in my opinion there is no absolute protection for any information, except that which is excluded from the definition of official information in section 2 of the Act. And a third point I made to them was that it would be wise to act on the assumption that the inquirer already has the information, and is merely seeking confirmation of it. Otherwise I was greatly impressed by what I heard, and by the degree to which departments had prepared for what is a new development in their experience.

Since 1 July, however, a strange paralysis seems to have descended on some departments. One wonders whether they have a manual, not yet released, the title of which might be *A Thousand and One Ways to Seek Comfort from Sections 6 to 9 in Order to Avoid Looking at Sections 4 and 5*. Sections 4 and 5, of course, set out the purposes of the Act, and the principles on which it is based. They do, of course, stand *pari passu* with the other sections of the Act, and indeed have to be interpreted in the light of the Acts Interpretation legislation which says that every Act which Parliament deems to be for the public good shall receive "such fair, large, and liberal construction and interpretation" as will best ensure the attainment of the object of that Act according to "its true intent, meaning, and spirit". So I attempt to approach my function on that basis, and I believe on the experience that we have had to date with requests for review that there has been a failure to look closely enough at what the Official Information Act actually says.

That applies to people who are seeking information, and it applies in some cases to departments called upon to provide it. People who are requesting information should be aware that the Act does not talk about documents, files, or whatever. It talks about information. And there may

(The Chief Ombudsman was invited to speak to the convention at the conclusion of the panel discussion.)

be cases in which the information that somebody wants can in fact be provided by releasing perhaps 90 percent of a document; but if the purpose of the request is to be able to go away feeling that a victory has been scored over a minister or a department, or a member of the opposition, or somebody else, then I think it is legitimate for departments to inquire as to precisely what information is being sought.

Many people and organisations made submissions to the select committee while the Bill was being considered, and some of us in other more subtle ways tried to influence what actually went into the legislation. But those considerations are now all irrelevant, and what we have to look at is what actually appears in the Act. I myself made some submissions, not all of which were accepted. However, one which I regard as of particular importance was accepted: namely, and I am speaking in general terms, the provision that nothing in the Act should limit the way in which the ombudsmen are able to operate. The test for me of the effect of the implementation of this Act, therefore, is whether it results in a freeing up of the amount of information that is made available to the public over what can be secured through the Ombudsmen Act. I have said with nauseating frequency over the past eighteen months that it has always been a major function of the ombudsmen to obtain from government agencies information which would not otherwise be available. When passed on to a complainant this material in effect becomes public information in the sense that the ombudsmen have no control whatever over what the complainant does with it. That is the test I will necessarily apply.

Referring back to the need to look closely at what the Act actually says, section 9 is the one section which is frequently being relied on in relation to the requests for review which our office has received. If you can work your way through the maze of section 9 (1) — which is a masterpiece of the law draughtsman's art, excelled only by the amendment to the Human Rights Commission Act which is supposed to clarify the nature of religious discrimination — and you read a little further down you find that this section applies if and only if the withholding of the information is necessary to protect the various interests which are set out in the sub-sections below. One particular subsection which has often been referred to in the reports which we have received from departments is section 9 (2) (f) (iv), regarding the confidentiality of advice tendered by ministers of the Crown and officials. It has been put to me in several cases that withholding of the particular information is deemed necessary to protect the confidentiality of advice tendered by ministers and officials. But that, in fact, is not what the section says. It says rather that what is to be protected is the maintenance of the constitutional conventions for the time being which protect these things.

Now, I don't know whether anyone can tell me what the constitutional convention is; I don't know whether anyone has addressed themselves to it. The immediate answer would probably be that we have a Westminster-type system of government, and these conventions are inherent in it. But what are the essentials of a Westminster-type government? I could tell you, because I took the trouble to look them up. It seems to me that we are going to have to look closely at the extent to which

what we understand in general and vague terms to be constitutional conventions are in fact operating constitutional conventions now. It may be that the virginity of some of them has been impaired, for example, by the operations of my office over the past twenty years, because I have never been confronted with the proposition that because it would breach a constitutional convention I may not make available to a complainant the nature of advice given to a minister. A specific example comes from a report that I did on some loans granted by the Rural Bank. A paragraph in that report says, *"In February 1979, Treasury sought to have a ceiling placed on the Land Development Encouragement Loans because approvals were running far ahead of budget. Cabinet rejected the Treasury submission on 5 March 1979, and no further attempts to limit the loans were made."* That report in draft form was submitted to the Rural Bank. The Bank did not suggest to me that by including this passage in the report I was breaching a constitutional convention. I quote this as an example of the kind of thing that we are going to have to examine in great detail. That obligation is finally placed on my office, but I hold to the belief and expectation that this kind of examination should be done by the departments and other agencies themselves.

Since the Official Information Act came into operation the ombudsmen's office has received 47 requests for review. In the absence of statistics probably no-one can say what proportion of genuine requests for information that figure represents. But it is too many to be coming in at this early stage. Understandably, the number probably reflects the real difficulties agencies confront in developing philosophies and practices concerning the release of information under this new regime.

To conclude, I would urge you all to look very closely at what is actually said in the Act, rather than — as I think has happened in some cases — making a decision based on a perception that something shouldn't be released, and then referring to the Act to find grounds to justify withholding it. It may turn out in the longer run that matters are interpreted somewhat differently in the ombudsmen's office.

In so saying I am reminded of one of my first engagements in Washington, in 1949, when I attended the signing of the NATO Treaty. As the President and the Secretary of State moved up to the rostrum in the auditorium, the Marine Corps Band with a kind of political perception not usually associated with military bands struck up with, *It Ain't Necessarily So.* I would suggest to you that as you go about interpreting the Official Information Act you might hum to yourself, *It Ain't Necessarily So.*

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STUDIES IN PUBLIC ADMINISTRATION
NO. 29

On 1 July 1983 the Official Information Act came into force. Its genesis was part of a trend among many western democracies towards more open access to governmental information.

Although arguments on the need for, and on the scope and design of this Act had been well canvassed in public debate by the time of its introduction, there has remained some uncertainty about how it might be interpreted and implemented.

In view of this, and in accordance with its objectives of promoting improved government administration and enhanced public understanding of it, the New Zealand Institute of Public Administration at its 1983 annual convention examined issues relating to the operation of this statute. Most of those taking part were either intimately involved in the administration of the Act or were uniquely placed to observe that process.

In providing a record of those discussions this book not only helps to clarify some important points at issue in regard to the Official Information Act (while raising others), but also provides a "snapshot" of various perspectives at the beginning of a reform that should prove to have a major impact on New Zealand governmental administration.

NZIPA